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Supreme Court, U.S.
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No. 92-

In the Supreme Court of the United States.

October Term, 1992

JOSEPH J. PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTE at WALPOLE, et al.,
Petitioner,

v.

DENNIS J. DOMEGAN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for The First Circuit

---

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QUESTION PRESENTED

Whether the First Circuit erred in awarding attorney's fees pursuant to 42 U.S.C. § 1988, to a civil rights plaintiff whose only recovery was a nominal damage award of one dollar, in contrast to the decision of the Fifth Circuit in Estate of Farrar v. Cain, 941 F.2d 1311 (5th Cir. 1991), cert. granted sub nom., Farrar v. Hobby, 112 S.Ct. 1159 (1992), the relevant precedents of this Court, and the congressional purpose behind the fee statute.

PARTIES TO THE PROCEEDING

The petitioners are Joseph J. Ponte, Superintendent of the Massachusetts Correctional Institution at Walpole ("MCI-Walpole"), Frank Leppert, Administrator of the Department Segregation Unit ("DSU") at MCI-Walpole, and Peter Gallagher, Acting DSU Administrator during the period relevant to this case.

The respondent is Dennis J. Domegan.

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No. 92- .

IN THE
SUPREME COURT OF THE UNITED STATES

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JOSEPH J. PONTE,
SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTE at WALPOLE,
ET AL.,
Petitioners,

v.

DENNIS J. DOMEGAN,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Joseph J. Ponte, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, entered on August 10, 1992, in this case. The petitioners further request that the Court hold this petition, and order summary disposition on the merits following its pending decision in Estate of Farrar v. Cain, 941 F.2d 1311 (5th Cir. 1991), cert. granted sub nom., Farrar v. Hobby, 112 S.Ct. 1159 (1992). Supreme Court Rule 16.1.

OPINIONS BELOW

The opinion of the Court of Appeals (Cyr, J.) on the issue of attorney's fees is reported at 972 F.2d 401 (1st Cir. 1992), and is reprinted in the

appendix hereto, at pages 1a-125a. The opinion of the concurring justice (Campbell, J.) is reported at 972 F.2d at 425, and is reprinted in the appendix at page 126a. The Memorandum and Order of the District Court (Zobel, J.) on the issue of attorney's fees is unreported, and is reprinted in the appendix at pages 127a-133a. The earlier opinion of the Court of Appeals on the issue of qualified immunity is reported as Domegan v. Fair, 859 F.2d 1059 (1st Cir. 1989).

JURISDICTION

The judgment of the Court of Appeals was entered August 10, 1992. App. 3a. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1988(b). Attorney's fees.

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

On or about August 15, 1983, the respondent Dennis J. Domegan ("the Respondent" or "Domegan"), filed a pro se complaint in the District Court for the District of Massachusetts, based on Domegan's placement in the Alternate Feeding Program ("AFP") at MCI-Walpole for two periods, in May and July of 1983. Appendix ("App.") 5a. The first placement occurred because Domegan threw

his food tray and human waste against the wall outside his cell. Id. at n.1. The second placement also occurred because Domegan threw his food and tray outside his cell. Id. Jurisdiction in the District Court was under 28 U.S.C. §§ 1331 and 1343.

At the time the action was filed, prisoners in the AFP received meals of two cheese sandwiches, with water from the inmate's cell, served behind the closed solid steel door of the inmate's cell. App. 6a. No pre-placement process was offered to the inmate, and AFP status was reviewed every fifth day. Id.

On November 1, 1983, the AFP was substantially revised to provide a more varied and nutritious menu. App. 8a n.3.

In 1985, the AFP was revised to provide for post-placement review after every meal. Id.

In March 1984, the District Court appointed Goodwin, Procter & Hoar as counsel for the respondent. App. 6a. The third and final amended complaint filed by Domegan alleged claims of: cruel and unusual punishment (Eighth and Fourteenth Amendments; 42 U.S.C. § 1983; Mass. Gen. L. ch. 12, §§ 11H, 11I); violation of due process (Fourteenth Amendment; 42 U.S.C. § 1983; Mass. Gen. L. ch. 12, §§ 11H, 11I) and violation of the Massachusetts Civil Rights Act (Mass. Gen. L. ch. 12, § 11I). App. 6a-7a. The third amended complaint sought declaratory and injunctive relief, compensatory damages totaling

$50,000, and punitive damages totaling $350,000 ($35,000 from each of ten defendants). App. 7a-8a.

On cross-motions for summary judgment, the District Court entered judgment in favor of Domegan on his procedural due process claim, but denied the motions in all other respects. App. 8a-9a. The defendants' filed an interlocutory appeal from the denial of their motion for summary judgment on grounds of qualified immunity. The First Circuit affirmed the District Court's refusal to grant summary judgment on such grounds. Domegan v. Fair, 859 F.2d 1059 (1st Cir. 1989).

While the interlocutory appeal was pending, Domegan was released from custody on October 11, 1988. App. 8a

n.3. Thus, he did not pursue his claims for injunctive and declaratory relief. Id. The case proceeded to trial on the remaining claims for damages in March 1989. Id. The jury awarded Domegan $1.00 in "compensatory" damages against the three petitioners on the procedural due process claim, and returned verdicts in favor of all of the defendants on each of the respondent's remaining claims. App. 9a.

Domegan petitioned the District Court for an award of attorney's fees and costs in the amount of $88,655.16, pursuant to 42 U.S.C. § 1988. Id. Though the District Court determined that Domegan was entitled to an award of attorney's fees, it reduced the requested amount to $41,441.55.

App. 133a. On appeal, the First Circuit upheld the awarding of fees, but further reduced the amount to $37,123.85. App. 125a.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS DISAGREE AS TO WHETHER A PARTY WHO RECEIVES ONLY A NOMINAL DAMAGE AWARD OF ONE DOLLAR IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER 42 U.S.C. § 1988.

In ruling that attorney's fees are available under 42 U.S.C. § 1988, to a party whose only recovery in a civil rights case is a nominal damage award of one dollar, the Court of Appeals took sides in an already-existing split among the circuits. See App. 32a-35a & n.11. Particularly, in Estate of Farrar v. Cain, 941 F.2d 1311 (5th Cir. 1991),

cert. granted sub nom. Farrar v. Hobby, 112 S.Ct. 1159 (1992), the Fifth Circuit held that the plaintiffs in that case, who received a nominal damage award of one dollar on their civil rights claims, were not "prevailing parties" for purposes of 42 U.S.C. § 1988, and therefore were not entitled to an award of attorney's fees.

Farrar is not distinguishable from the instant case in any significant way relevant to the issue of attorney's fees. The Farrars filed suit against various Texas officials under 42 U.S.C. §§ 1983 and 1985, seeking both injunctive relief and monetary damages for violation of their civil rights. 941 F.2d at 1312. As in the instant case, the claim for equitable relief was

abandoned during the litigation, and the case went to the jury on only the plaintiffs' claims for damages. Id.

The jury found that one of the defendants "'committed an act or acts under color of state law that deprived Plaintiff Joseph Farrar of a civil right,' and that [the defendant's] acts were not the proximate cause of any injury." Id. at 1312-13. On appeal, however, the Fifth Circuit remanded for entry of a nominal damage award for the civil rights violation, relying on Carey v. Piphus, 435 U.S. 247 (1978).[1/]

1/ The First Circuit relied heavily on Carey in its decision to award attorney's fees in the instant case. App. 28a-29a n.10, 65a-67a & n.23, 78a-85a.

The Farrars also filed an application for attorney's fees under 42 U.S.C. § 1988, which was approved by the District Court in an amount approximating $300,000. 941 F.2d at 1313. Applying this Court's decisions in Texas State Teachers v. Garland Independent School District, 489 U.S. 782 (1989), Rhodes v. Stewart, 488 U.S. 1 (1988), and Hewitt v. Helms, 482 U.S. 755 (1987), the Fifth Circuit reversed, holding that the Farrars were not "prevailing parties" for purposes of 42 U.S.C. § 1988. 941 F.2d at 1313.

At various points in its opinion in the instant case, the First Circuit expressly recognized the conflict between its decision and that of the Fifth Circuit in Farrar. See App. 43a

("With respect, and recognizing the closeness of the question, we would ascribe a somewhat different intendment to the principles enunciated in Hewitt and applied in Rhodes . . ."); App. 80a ("Respectfully, we are unable to agree that a bona fide civil rights action converts to a mere 'damage suit' simply by an adjustment to the ad damnum . . ."). Additionally, the concurring justice noted that the difficult question presented by this case would presumably be "definitively" resolved by this Court's decision following its grant of certiorari in Farrar. App. 126a.

In its opinion, the First Circuit went to great lengths to reiterate the Fifth Circuit's characterization of

Farrar as a case solely about damages. App. 33a n.11, 78a-80a. However, the Court of Appeals did not, and indeed could not, point to any substantive distinction between the instant case and Farrar, beyond such labeling. Like the instant case, Farrar included an initial claim for equitable relief in addition to the claims for damages, but, as in the present case, the claim for equitable relief was abandoned during the course of the litigation. 941 F.2d at 1312.

The claims for equitable relief in this case were properly abandoned when Domegan was released from custody on October 11, 1988. App. 8a n.3. Because Domegan brought the action on behalf of himself only, not on behalf of

a class, no equitable relief could be afforded after Domegan's release. Compare Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970). Also, significantly, by the time this case went to the jury, the AFP had been changed to the point that it "bore little resemblance to the original." Domegan v. Fair, 859 F.2d at 1062 n.3.[2/] Therefore, even if the claims for equitable relief were not moot, it is unlikely that Domegan would have been afforded such relief based on his original claims.

2/ Domegan has never asserted that the changes were occasioned by his suit. App. 46a n.15.

Thus, as in Farrar, by the time this case went to the jury, all that was left to consider were Domegan's claims for damages for alleged past violations of his civil rights. Similarly, no distinction can be drawn based on the fact that in this case, the District Court found a constitutional violation, whereas in Farrar, it is not clear what civil right the jury found to have been violated. 941 F.2d 1312-1313. The Fifth Circuit treated the jury's finding as a finding of a constitutional violation for purposes of awarding attorney's fees. Id. at 1315.

Thus, the decision in this case directly conflicts with that of the Fifth Circuit in Farrar. The Court should grant a writ of certiorari in

this case in order to allow it to achieve uniformity among the circuits, consistent with whatever decision this Court issues in Farrar.

II. THE QUESTION PRESENTED BY THIS CASE IS OF GREAT PUBLIC IMPORTANCE.

This Court has already noted the significance of the issue presented by this case by granting a writ of certiorari in Farrar. Moreover, the Court expressly noted in Garland "the importance of the definition of the term 'prevailing party' to the application of § 1988 and other federal fee shifting statutes[.]" 489 U.S. at 784. The fact that a split has arisen among the circuits in the wake of Garland regarding whether a plaintiff who receives a nominal damage award is a

"prevailing party," App. 32a-35a & n.11, indicates that further elucidation of the issue by this Court is needed.

The First Circuit's opinion amply notes the importance of the availability of attorney's fees to enforcement of our country's civil rights laws. App. 68a. Also of great importance, however, is the impact of such fee awards on public entities and public officials. As is indicated by the circumstances of both this case and Farrar, the defendants in cases where attorney's fees are claimed under 42 U.S.C. § 1988, tend to be public officials. See also H. R. Rep. No. 94-1558, p. 7 (1976). Because state entities generally are not liable for damages under the federal laws to which § 1988 applies, Ngiraingas v. Sanchez,

495 U.S. 182 (1990); Will v. Michigan Department of State Police, 491 U.S. 58 (1989), potentially large awards of attorneys fees under § 1988,[3/] for the most part, must be paid from the personal assets or insurance of public officials. The availability of large fee awards in cases where plaintiffs have suffered only nominal damages may cause timidity in the execution of the duties of public officials and will make it more difficult to attract able and qualified individuals into public

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3/ As mentioned above, the fee award in Farrar was in the range of $300,000. 941 F.2d at 1313.

service. Compare Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

In order to alleviate the above-described problem, States such as Massachusetts have enacted statutes providing for indemnification of public officers. See Mass. Gen. L. ch. 258, § 9. When such statutes apply, and in cases involving municipalities, which do not share States' Eleventh Amendment immunity, the public fisc will bear the brunt of awards of attorney's fees in nominal damage cases. Given the increasingly tight financial circumstances of state and local governments, the public importance of the question presented by this case looms large. For these reasons as well,

the Court should grant a writ of certiorari in this case.

III. THE FIRST CIRCUIT ERRONEOUSLY APPLIED THIS COURT'S PRECEDENTS IN AWARDING ATTORNEY'S FEES BASED ON A NOMINAL DAMAGE AWARD OF ONE DOLLAR.

The First Circuit properly noted that under this Court's decision in Garland, in order to be a "prevailing party" for purposes of receiving an award of attorneys fees under § 1988, a plaintiff must have "(i) obtained relief on a significant claim in litigation, (ii) effecting a material alteration in the parties' legal relationship, (iii) that is not merely technical or de minimus in nature." App. 64a, citing Garland, 492 U.S. at 791-93 (emphasis omitted). Petitioners do not dispute that Domegan obtained some, albeit

nominal, relief, or that his procedural due process claim was "significant." The Court of Appeals' wrongly concluded, however, that the one dollar damage award in this case effected a material alteration in the parties' legal relationship, and that the judgment was more than a technical or de minimus victory.

A. The One Dollar Damage Award Did Not Effect A Material Alteration In The Parties' Relationship As Defined By This Court In Garland.

Noting in Garland the requirement that in order to recover attorney's fees a plaintiff "must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant[,]" this Court cited

its previous opinions in Hewitt, 482 U.S. at 760-61 and Rhodes, 488 U.S. at 3-4. Garland, 489 U.S. at 792. The First Circuit's decision in this case, however, fails to properly follow the decisions in Hewitt and Rhodes.

In Hewitt, the Third Circuit found that the plaintiff's due process rights had been violated by his conviction on prison disciplinary charges based solely on hearsay evidence. 482 U.S. at 758, citing Helms v. Hewitt, 655 F.2d 487, 502 (3rd Cir. 1981) (Helms I). On remand, however, the District Court did not enter judgment in favor of the plaintiff because it ruled that the defendants were entitled to qualified immunity. 482 U.S. at 758. This Court ruled that in such circumstances, the

plaintiff was not a prevailing party for purposes of § 1988 attorney's fees with respect to his due process claim. 482 U.S. at 759-60.

The Court noted that the bare determination that the plaintiff's rights had been violated, in the absence of any redress to the plaintiff, could not be considered prevailing for purposes of § 1988. 482 U.S. at 760, 762. "In all civil litigation, the judicial decree is not the end but the means. . . . The real value of the judicial pronouncement . . . is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff." 482 U.S. at 761 (emphasis in original).

In this case, the District Court's determination that Domegan's procedural due process rights were violated, coupled with only the award of a single dollar in damages, cannot be said to have affected the petitioners' behavior towards Domegan in any significant way, as a judgment granting declaratory or injunctive relief, or an award of money damages of a more than negligible amount, would have. Therefore, under this Court's reasoning in Hewitt, Domegan was not a prevailing party for purposes of an award of attorney's fees. The First Circuit's attempt to distinguish Hewitt was erroneous. See App. 36a-44a.

The First Circuit also failed to properly follow this Court's decision in

Rhodes. App. 45a-47a. In Rhodes, a declaratory judgment entered to the effect that the defendant had violated the plaintiffs' constitutional rights by refusing them permission to subscribe to a magazine. 488 U.S. at 2. However, prior to entry of judgment, one of the two plaintiffs died, and the other was released from state custody. Id. at 3. Thus, even though judgment entered in favor of the plaintiffs, the defendants' behavior towards the plaintiffs would not be affected in the circumstances of the case. Id. at 4. Therefore, following its reasoning in Hewitt, this Court held that the plaintiffs would not be considered prevailing parties for purposes of § 1988. Id.

As in Rhodes, Domegan's release from prison prior to the entry of judgment (as well as the change in policy) ensured that the judgment in this case would have no affect on the Petitioners' behavior towards him. Since, as pointed out above, the mere award of one dollar cannot be considered to have materially altered the parties' relationship in this case, the First Circuit erroneously determined that the plaintiff was entitled to an award of attorney's fees.

B. Even If The One Dollar Damage Award Changed The Legal Relationship Between The Parties, The Change Was Too Insignificant To Support Prevailing Party Status.

Even if the "absolute limitation" discussed above was satisfied in this

case, this Court noted in Garland that "a technical victory may be so insignificant, and may be so near the situations addressed in Hewitt and Rhodes, as to be insufficient to support prevailing party status." 489 U.S. at 792. Because, as argued above, this case falls squarely within the situations addressed in Hewitt and Rhodes, it was erroneous for the First Circuit to award attorney's fees for this reason as well.

The Court in Garland offered a number of additional examples of when technical or de minimus success on a legal claim would not warrant prevailing party status. 489 U.S. at 792. One such example is the case of New York City Unemployed and Welfare Council v.

Brezenoff, 742 F.2d 718 (2nd Cir. 1984) (Brezenoff II). The plaintiff in that case alleged that four regulations of the New York City Human Resources Administration which limited organizing activities in the City's Income Maintenance Centers, violated its members' constitutional rights. New York City Unemployed and Welfare Council v. Brezenoff, 677 F.2d 232, 234 (2nd Cir. 1982) (Brezenoff I). However, only a minor provision of one of the four regulations was held to be invalid. Id. at 235 n.4.

In the passage of Brezenoff II cited by this Court, the Second Circuit affirmed the District Court's denial of an award of attorney's fees on grounds that the relief obtained was de minimis

in comparison to the relief sought by the plaintiff. 742 F.2d at 724 n.4. Similarly, a comparison of the one dollar damage award in this case to the relief sought by Domegan, see supra at 6-7, indicates that Domegan failed to cross the de minimus threshold that would entitle him to an award of attorney's fees. The First Circuit's decision was erroneous for this reason as well.[4/]

4/ The Court of Appeals refused to compare the meager relief granted to Domegan with the relief he sought in this case for purposes of determining whether he was a prevailing party, taking the position that "degree of success" may only be considered for purposes of determining the amount of a fee award rather than its availability. App. 62a-64a. However, this Court's citation to the particular passage in Brezenoff II makes clear that the relief granted must exceed some minimal threshold in relation to the relief

(footnote continued)

C. The Court Of Appeals' Decision Is Inconsistent With Congress's Intent In Enacting 42 U.S.C. § 1988.

This Court stated in Garland, "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." 489 U.S. at 782. The Court has

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(footnote continued)

sought, in order for a plaintiff to be a prevailing party. After that de minimus level is exceeded, then the degree of success can be considered for purposes of determining the amount of the fee. The First Circuit's attempt to explain away this Court's citation to the particular passage in Brezenoff II is wholly unconvincing. App. 57a n.19.

previously described Congress's intent in passing the fee statute as replicating the fee provisions of the 1964 Civil Rights Act, and related legislation. See Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983).

At the time Congress enacted § 1988, this Court had issued two opinions discussing the fee provisions of the 1964 Act, Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) and Northcross v. Memphis Board of Education, 412 U.S. 427 (1973). Those opinions are cited approvingly in the legislative history, as examples of proper applications of the award of fees in civil rights cases. H. R. Rep. No. 94-1558, p. 6. S. Rep. No. 94-1011, p. 4.

Both Newman and Northcross addressed situations where the plaintiffs served as "private attorneys general," enforcing statutory provisions in a manner that would have impact well beyond the circumstances of the individual plaintiffs. See Newman, 390 U.S. at 402; Northcross, 412 U.S. at 428.[5/] In such circumstances, awards of attorneys fees served the congressional purpose of promoting private enforcement of our nation's civil rights laws. H. R. Rep. No. 94-1558, p. 1. S. Rep. 94-559, p. 4.

5/ Both Newman and Northcross involved claims for injunctive relief. H. R. Rep. 94-1558, p. 9.

However, in cases where neither policies of general application nor parties beyond the individual plaintiffs are likely to be effected, the interests implicated are more analogous to the typical private lawsuit where a party seeks redress for personal injuries suffered at the hands of another. See Hensley v. Eckerhart, 461 U.S. at 444-45 n.4 (Brennan, J., dissenting). In such circumstances, where the award of damages is negligible, the congressional purpose is not served by a fee award.

The instant case plainly falls within the latter category. Given that the relevant policy had long been changed, the potential for impact of Domegan's judgment on others beyond himself was nil. Rather, Domegan's case

was purely an effort to seek damages for alleged past injuries suffered at the hands of the defendants. In such circumstances, it is perfectly appropriate to view success in terms of the degree of monetary relief obtained. See Riverside v. Rivera, 477 U.S. 561, 595 (1986) (Rehnquist, J., dissenting) ("this case shares none of the special aspects of certain civil rights litigation which . . . would justify an award of attorney's fees totally divorced from the amount of damages awarded by the jury."). The congressional purpose behind § 1988 would not be advanced by an award of attorneys fees in the circumstances of this case.

CONCLUSION

For the reasons stated in this petition, this Court should grant the petition for writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Respondent,

Appendix To Petition for a Writ of Certiorari

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1625

DENNIS J. DOMEGAN,
Plaintiff, Appellee,

v.

JOSEPH PONTE, ET AL.,
Defendants, Appellants.

No. 91-1753

DENNIS J. DOMEGAN,
Plaintiff, Appellee,

v.

JOSEPH PONTE, ET AL.,
Defendants, Appellants.

APPELAS FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT
OF MASSACHUSETTS
[Hon. Rya W. Zobel, U.S. District Judge]

Before

Campbell, Circuit Judge,
Bownes, Senior Circuit Judge,
and Cyr, Circuit Judge.

Stephen G. Dietrick, Deputy General Counsel, with whom Nancy Ankers White, Special Assistant Attorney General, was on brief for appellants defendants.

Paul E. Nemser with whom Paula M. Bagger and Goodwin, Procter & Hoar were on brief for plaintiff appellee.

August 10, 1992

CYR, Circuit Judge. After former inmate Dennis J. Domegan won a one dollar damage award in a civil rights action against certain Massachusetts corrections officials, the district court approved an attorney fee award against the defendants in the amount of $41,441.55 under 42 U.S.C. § 1988. The defendant officials challenge the fee award primarily on the ground that Domegan cannot be considered a "prevailing party" in light of the results achieved in litigation. With modifications to the amount of the award, we affirm the district court judgment.

I

BACKGROUND

On August 15, 1983, while imprisoned at the Massachusetts Correctional Institution at Walpole ("MCI-Walpole"), Domegan lodged a pro se complaint in the United States District Court for the District of Massachusetts, alleging civil rights violations under the Eighth and Fourteenth Amendments to the United States Constitution. The complaint stemmed from Domegan's disciplinary placement on the "Alternate Feeding Program" ("AFP") at MCI-Walpole in May and again in July of 1983. 1/

1/ The May placement occurred after Domegan threw his food tray and human waste against the wall outside his cell; in July, he threw his food and tray outside his cell.

At that time, each meal served to AFP inmates, including Domegan, consisted entirely of two cheese sandwiches. The solid steel doors of AFP inmate cells remained closed. The inmate was given no hearing prior to the AFP placement. AFP status was reviewed every five days by the prison official who recommended the particular placement. Domegan remained on AFP for seven and one-half days in May 1983, and for five days in July 1983.

During March 1984, the district court appointed Goodwin, Procter & Hoar [hereinafter Procter & Hoar] to represent Domegan. The final amended complaint asserted three causes of action: cruel and unusual punishment (Eighth and Fourteenth Amendments; 42

U.S.C. § 1983; M.G.L. c. 12, § 11 H,I);[2/] violation of due process (Fourteenth Amendment; 42 U.S.C. § 1983; M.G.L. c. 12, §§ 11 H,I); and violation of the Massachusetts Civil Rights Act (M.G.L. c. 12, § 11 I). The final amended complaint demanded declaratory and injunctive relief, compensatory damages totaling $50,000, and $35,000 in

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2/ Initially, Domegan sought to establish that the AFP was violative of the Eighth Amendmenet, facially and as applied, but later relinquished the facial claim. The "as applied" claim alleged that the defendant officers and sergeants assigned to the AFP: (i) turned off the electricity to Domegan's cell to prevent him from complying with the AFP regimen for receiving food at meal time; (ii) refused to feed him, knowing that he could not comply with the AFP regimen; and (iii) turned off his water supply.

punitive damages from each of the ten defendants.[3/]

Domegan was granted summary judgment on the procedural due process

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3/ The ten defendants named in the final amended complaint were Joseph J. Ponte, Superintendent at MCI-Walpole; Frank Leppert, Administrator of the Department Segregation Unit ("DSU") at MCI-Walpole; Peter Gallagher, Acting DSU Administrator; Sergeants Anthony Silva and James Brooks; and Officers Carl Harrison, Gary Mendes, Christopher Pires, Patrick Smith, and Brian Bissonnette. Three other defendants were named in earlier complaints but were dropped from the final amended complaint.

On November 1, 1983, two and one-half months after Domegan filed his pro se complaint, MCI-Walpole instituted a more varied and nutritious menu for AFP inmates. In 1985, MCI-Walpole revised its post-deprivation review procedures, requiring that each AFP inmate's status be reassessed after each meal. On or about October 11, 1988, prior to trial, Domegan was released from state custody, and the claims for injunctive and declaratory relief were not pursued.

claim. The case proceeded to trial on the remaining claims in March 1989. The jury awarded Domegan $1.00 in "compensatory" damages on the due process claim, but returned verdicts for all defendants on the remaining Eighth Amendment claims. Judgment was entered in the amount of $1.00 against Ponte, Leppert, and Gallagher.[4/] Domegan requested attorney fees and costs in the amount of $88,655.16, pursuant to 42 U.S.C. § 1988. Although the district court determined that Domegan was a "prevailing party" entitled to recover a reasonable attorney fee, it reduced the amount of

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4/ It is not clear why judgment was never entered against the other seven defendants.

the award to $41,441.55 in light of the limited success achieved in litigation. The defendants challenge the fee award on several grounds.[5/]

II

DISCUSSION

A. Appellate Jurisdiction

The district court "Memorandum and Order" awarding attorney fees was entered on May 24, 1991. A defective notice of appeal (No. 91-1625) was filed on June 24, 1991, naming no appellant except Ponte, and then only in the

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5/ Although judgment was entered only against defendants Ponte, Leppert and Gallagher, the other seven defendants joined the appeal because the attorney fee award ran against "defendants." As Domegan correctly concedes, however, there is no basis for an award against the seven codefendants who were found not liable. Accordingly, we dismiss these seven defendants-appellants.

following caption: "Domegan v. Ponte, et al." See Torres v. Oakland Scavenger Co., 487 U.S. 312, 314-15, 318 (1988) (use of "et al." does not satisfy Fed. R. App. P. 3(c) requirement that notice of appeal specify parties appealing); Pontarelli v. Stone, 930 F.2d 104, 108-09 (1st Cir. 1991) (same). In response to our order to show cause why the appeal ought not be dismissed except as to Ponte, on July 16 a motion for permission to file an amended notice of appeal was filed by defendants' counsel with the district court. See Fed. R. App. P. 4(a)(5). The district court granted the motion ex parte on the following day. But see id. ("Notice of any such motion which is filed after the expiration of the prescribed time shall

be given to the other parties in accordance with local rules."). See also D. Mass. R. 7.1(a)(2),(b),(e). An amended notice of appeal (No. 91-1753), naming all ten appellants, was promptly filed.

Domegan contends that the ex parte district court order, permitting appellants to file a corrected notice of appeal after the expiration of the original appeal period, was ineffective since the fourteen-day notice required by Local Rule 7.1 was not served. See Fed. R. App. P. 4(a)(5); D. Mass. R. 7.1(a)(2),(b),(e); see also, e.g., Hable v. Pairolero, 915 F.2d 394, 395 (8th Cir. 1990) (requiring notice of rule 4(a)(5) motion); Truett v. Johns-Manville Sales Corp., 725 F.2d

1301, 1302 (11th Cir. 1984) (same). Domegan also challenges the sufficiency of the showing of "good cause" or "excusable neglect" required under Fed. R. App. P. 4(a)(5). See, e.g., Pontarelli, 930 F.2d at 109-112. We need not address Domegan's contentions, however, as the initial notice of appeal was premature.

The district court "Memorandum and Order," entered May 24, did not satisfy the "separate document" rule. See Fed. R. Civ. P. 58 advisory committee note (1963) ("The amended rule . . . requir[es] that there be a judgment set out on a separate document --- distinct from any opinion or memorandum --- which provides the basis for the entry of judgment.") (emphasis added); Fiore v.

Washington county Community Mental Health Ctr., 960 F.2d 229, 234-35 (1st Cir. 1992) (en banc) (discussing generally the nature of a separate document); Smith v. Massachusetts Dep't of Correction, 936 F.2d 1390, 1393-94 (1st Cir. 1991) (memorandum and order does not constitute "separate document"); In re Smith Corset Shops, Inc., 696 F.2d 971, 975 (1st Cir. 1982) (same, applying analogous Bankruptcy Rule). As the order appealed from was not a "final judgment," see Fed. R. Civ. P. 54(a), 58, the appeal period never commenced running prior to the filing of the corrected notice of appeal. Fed. R. App. P. 4(a)(1), (7); Smith, 936 F.2d at 1394; Scola v. Boat Frances, R., Inc.,

618 F.2d 147, 151 (1st Cir. 1980); see also Bankers Trust Co. v. Mallis, 435 U.S. 381, 384-86 (1978) (per curiam) (purpose of "separate document" rule is to promote greater predictability as to when time for appeal begins to run); Fiore, 960 F.2d at 233 (same).[6/]

Although appellants at all times treated the May 24 "Memorandum and Order" as an appealable order, the "separate document" rule is to be

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6/ We raise the "separate document" issue sua sponte, as it is intertwined with Domegan's jurisdictional challenge. See, e.g., Caperton v. Beatrice Pocahontas Coal Co., 585 F.2d 683, 688-89 (4th Cir. 1978) (raising "separate document" issue sua sponte); see also Parisie v. Greer, 705 F.2d 882, 890-91 (7th Cir.) (Eschbach, J.) (discussing duty of court to raise "separate document" issue sue sponte), cert. denied, 464 U.S. 918, and cert. denied, 464 U.S. 950.

strictly applied as concerns the commencement of the appeal period. See United States v. Indrelunas, 411 U.S. 216, 221-22 (1973) (per curiam) (applying rule 58 mechanically notwithstanding previous aborted appeal by same appellant within appeal period); Fiore, 960 F.2d at 235 (discussing technicality of rule 58); Gregson & Assocs. Architects v. Government of the V.I., 675 F.2d 589, 592-93 (3d Cir. 1982) (Indrelunas applied despite both parties' treatment of memorandum opinion as appealable order); Caperton v. Beatrice Pocahontas Coal Co., 585 F.2d 683, 688-90 (4th Cir. 1978) ("nor are we free to penalize plaintiffs . . . by binding them to their erroneous assertion that judgments" had been

entered); see also Fiore, 960 F.2d at 237 (emphasizing that the "separate document" requirement "should always be interpreted 'to prevent loss of the right to appeal, not to facilitate loss'") (quoting Bankers Trust, 435 U.S. at 386); Willhauck v. Halpin, 919 F.2d 788, 792 (1st Cir. 1990) (same); 9 Moore's Federal Practice ¶ 58.02.1[2], at 58-20 to 21. Nevertheless, a notice of appeal deemed premature due to noncompliance with the "separate document" rule does not deprive the appellate court of subject matter jurisdiction, Bankers Trust, 435 U.S. at 384, 385; see also Smith, 936 F.2d at 1394 (applying Bankers Trust), and the appeal may proceed in the normal course where the court of appeals determines

that the "separate document" requirement was waived by the parties. Bankers Trust, 435 U.S. at 384-86; Smith, 936 F.2d at 1394.

The district court treated its May 24 "Memorandum and Order" as an appealable order; it was duly docketed; and no party challenged appellate jurisdiction for failure to comply with the "separate document" requirement. See Smith, 936 F.2d at 1394 (finding waiver); see also Bankers Trust, 435 U.S. at 387-88 (considering same factors). Compare Fiore, 960 F.2d at 232, 237. All parties to the present appeal consistently treated the May 24 "Memorandum and Order" as a final judgment and there is no suggestion that unfair prejudice would be occasioned any

party by our assertion of appellate jurisdiction, without remanding for formal compliance with the "separate document" requirement. See Smith, 936 F.2d at 1394 (assertion of appellate jurisdiction proper, as parties waived "separate document" requirement and would not be prejudiced). Moreover, dismissal of the second notice of appeal in these circumstances, solely to permit compliance with the "separate document" rule, would force "[w]heels to [to] spin for no practical purpose." Bankers Trust, 435 U.S. at 385; Smith, 936 F.2d at 1394 ("We will not needlessly 'force the parties round and round the mulberry bush' . . . ." (quoting Jusino v. Zayas, 875 F.2d 986, 989-90 (1st Cir. 1989)).

B. The Merits

1. "Prevailing Party"

The principal focus of appellants' discontent with the fee allowance in the instant case is that the district court determined that Domegan was a "prevailing party" even though he obtained only a one dollar damage award. Absent "special circumstances" which would render an award unjust, ordinarily a civil rights plaintiff who qualifies as a "prevailing party" is entitled to a reasonable award of attorney fees under 42 U.S.C. § 1988.[7/]

7/ Section 1988 provides, in part: "In any action or proceeding to enforce a provision of section[] . . . 1983 . . . , the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988.

Hensley v. Eckerhart, 461 U.S. 424, 429 (1983); de Jesus v. Banco Popular de Puerto Rico, 918 F.2d 232, 234 (1st Cir. 1990); Stefan v. Laurenitis, 889 F.2d 363, 370 (1st Cir. 1989).

A prevailing party is one who "has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the [plaintiff] sought in bringing suit' . . . ." Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 791-92 (1989) [hereinafter Texas Teachers] (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)). "[A]t a minimum . . . the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." Id. at 792.

Moreover, even under this "generous formulation," as the Court stated in Texas Teachers, the plaintiff cannot qualify as a "prevailing party" if his "success on a legal claim can be characterized as purely technical or de minimis . . . ." Id. "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." Id. at 792-93 (emphasis added).

The district court determination that Domegan met the "prevailing party" test is subject to de novo review. See Romberg v. Nichols, 953 F.2d 1152, 1156 (9th Cir. 1992) ("We must reverse . . . if the district court applied incorrect

legal standards to reach [the factual finding underlying its "prevailing party" determination]."); Guglietti v. Secretary of Health & Human Services, 900 F.2d 397, 399 (1st Cir. 1990) (where normal deference due EAJA fee award could not be accorded because district court misapprehended the record, court of appeals would decide case, rather than remand, as the facts were not in genuine dispute and the "prevailing party" question is "largely one of law . . ."). But cf. McDonald v. Secretary of Health & Human Services, 884 F.2d 1468, 1474 (1st Cir. 1989) ("abuse of discretion" standard governs review of "prevailing party" determination

in EAJA fee award cases).[8/]

8/ McDonald broadly established an "abuse of discretion" standard of review for all "prevailing party" determinations in EAJA cases. As subsequently demonstrated in Guglietti, however, certain aspects of the "prevailing party" determination in a particular case may turn solely on the proper legal standard, making de novo review appropriate. The "prevailing party" determination in the present case does not entail any of the considerations which led us to apply a deferential standard of review in McDonald. Nor does it involve fact-based inquiries like those we found appropriate for deferential review in Langton v. Johnston, 928 F.2d 1206, 1225 (1st Cir. 1991) (district court assessment of causation and materiality elements in the "catalyst" test) (§ 1988 award). The only question in the present case is whether a judgment for one dollar in damages entitles Domegan to "prevailing party" status. The facts are not in dispute, see Guglietti, 900 F.2d at 399, and application of the "prevailing party" test presents a pure question of law warranting plenary review.

Moreover, as we have explained, the district court's discretion to deny a fee award to a "prevailing party" under section 1988 is narrowly circumscribed:

(footnote continued)

Although Domegan met with no success on the Eighth Amendment and state law claims, he obtained a favorable verdict on the procedural due process claim, a "significant issue in litigation." See Langton v. Johnson, 928 F.2d 1206, 1226 (1st Cir. 1991) (assessing significance "given the scope

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(footnote continued)

> Despite the explicit grant of discretion in section 1988, it is well-established [sic] that a court may not deny an award of attorney's fees to a prevailing civil rights plaintiff in the absence of special circumstances rendering the award unjust, and this court requires findings of fact and conclusions of law identifying the special circumstances and explaining why an award would be inappropriate.

de Jesus, 918 F.2d at 234 (citations omited) (emphasis added).

and tenor of the litigation as a whole").[9/]

9/ Appellants attempt to demonstrate the de minimis nature of Domegan's one dollar "compensatory" damage award on the procedural due process claim against three defendants by pointing out that he asserted 42 "defendant/counts" at the "height" of the litigation. The same sort of argument was made by the defendants in Rogers v. Okin, 821 F.2d 22 (1st Cir. 1987), cert. denied, 484 U.S. 1010 (1988). In rejecting their contention, this court stated that the defendants had "adopted the kind of 'mathematical aproach' criticized in [Hensley v. Eckerhart, 461 U.S. 424, 435-36 n.11 (1983)] . . . ." Id. at 25. Along the lines explained in Rogers, "prevailing party" success cannot be measured by an arithmetic comparison of the claims and defendants joined in the complaint with the number of claims and defendants named in the final judgment. Id. (rejecting defendants' attempt to minimize plaintiffs' success by claiming victory on "no fewer than 224" issues); see Hensley, 461 U.S. at 435-36 n.11 (mathematical comparison of the total number of issues in a case with those actually won "provides little aid in determining what is a reasonable fee in light of all the relevant factors"), quoted in Rogers, 821 F.2d at 25.

(footnote continued)

Appellants insist, nonetheless, that the final judgment cannot have had any significant effect on their legal relationship with Domegan, and question how a one dollar damage award can be considered other than de minimis success. Although one dollar most assuredly is a nominal amount, the final judgment nonetheless represented "some"

(footnote continued)

Domegan's procedural due process claim doubtless represented a significant constitutional claim in qualitative terms. We cannot treat the quantitative dimensions of the relief obtained on the due process claim as dispositive of the allowability, vel non, of a § 1988 fee award, as distinguished from the reasonableness of the amount awarded. Texas Teachers, 489 U.S. at 790, 793 ("the degree of the plaintiff's overall success" goes to the reasonableness, not the allowability of the award); Nadeau v. Helgemoe, 581 F.2d 275, 281 (1st Cir. 1978) (some fee award appropriate where success is but partially attributable to plaintiff's lawsuit).

of the benefit sought in the litigation; namely, an enforceable judgment against the defendant officials who deprived the plaintiff of the constitutional right to due process of law. We are unable to agree that an enforceable judgment for nominal damages redressing significant procedural due process violations cannot qualify the plaintiff for "prevailing party" status.[10/]

10/ similarly, the Supreme Court has never intimated that a valid final judgment declaring a violation of a claimant's civil rights constituted "purely technical or de minimis" success simply because no compensatory damage award or injunctive relief was obtained. Rather, presumably in recognition of the fact that the wrong occasioned by a procedural due process violation often is not susceptible to monetary measurement, The Court has stated that plaintiffs who establish a procedural due process violation "nevertheless will be entitled to recover nominal damages not to exceed one dollar . . . ." Carey v. Pipus, 435 U.S. 247, 267 (1978)

(footnote continued)

a. Baseline Criteria

Prior to Texas Teachers at least, attorney fees were not withheld under section 1988 simply because the plaintiff merely obtained a nominal

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(footnote continued)

(emphasis added); Maldonado Santiago v. Velazquez Garcia, 821 F.2d 822, 829 (1st Cir. 1987) (citing Carey). See Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 308 n.11 (1986) (Nominal damages "are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury"); see also, e.g., Fassett by and through Fassett v. Haeckel, 936 F.2d 118, 121 (2d Cir. 1991) (Fourth Amendment violation); Floyd v. Laws, 929 F.2d 1390, 1401-03 (9th cir. 1991) (violation of "constitutional rights"); Cowans v. Wyrick, 862 F.2d 697, 699, 700 (8th cir. 1988) (Eighth Amendment violation); Farrar v. Cain, 756 F.2d 1148, 1152 (5th Cir. 1985) (violation of "civil rights"); Kincaid v. Rusk, 670 F.2d 737, 746 (7th Cir. 1982) (violation of due process and First Amendment); McGhee v. Draper, 639 F.2d 639, 646 (10th Cir. 1981) (due process violation). But cf. Ganey v. Edwards, 759 F.2d 337 (4th Cir. 1985) (award of nominal damages left to jury).

damage award. Perez v. University of Puerto Rico, 600 F.2d 1, 2 (1st Cir. 1979) ("Fees may not be denied simply because only nominal damages are awarded."); Ganey v. Edwards, 759 F.2d 337, 339-40 (4th Cir. 1985) (liability determination need not even be accompanied by nominal damage award); Burt v. Abel, 585 F.2d 613, 618 (4th Cir. 1978) (nominal damage award sufficient); Basiardanes v. City of Galveston, 682 F.2d 1203, 1220 (5th Cir. 1982) (judgment for nominal damages may warrant fee award); Skoda v. Fontani, 646 F.2d 1193, 1194 (7th cir. 1981) (per curiam) ($1.00 judgment satisfies "prevailing party" requirement); Hogue v. Clinton, 791 F.2d 1318, 1323 (8th Cir.) (absent proof of actual injury,

plaintiff should be granted nominal damages and attorney fees), cert. denied, 479 U.S. 1008 (1986); Scofield v. City of Hillsborough, 862 F.2d 759, 766 (9th Cir. 1988) (attorney fees allowable solely on basis of nominal damage award); see Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986) (title VII case citing Nephew v. City of Aurora, 766 F.2d 1464, 1466 (10th Cir. 1985)), a § 1988 case subsequently reversed on other grounds, 830 F.2d 1547 (10th Cir. 1987) (en banc); nominal damage award entitled plaintiff to attorney fees); Garner v. Wal-Mart Stores, Inc., 807 F.2d 1536, 1539 (11th Cir. 1987) (Title VII case; nominal damage award confers "prevailing party" status). But compare Huntley v.

Community Sch. Bd., 579 F.2d 738, 742 (2d Cir. 1978) (district court did not abuse discretion in determining that $100 damage award on procedural due process claim amounted, at most, to "moral victory") with Milwe v. Cavuoto, 653 F.2d 80, 84 (2d Cir. 1981) (nominal damage award on constitutional claim stemming from official misconduct "sufficient to support an award of fees") (alternate holding).

Much as the Fifth circuit recently pointed out, however in Estate of Farrar v. Cain, 941 F.2d 1311, 1317 (5th Cir. 1991) cert. granted sub nom. Farrar v. Hobby, 112 S. Ct. 1159 (1992) all of the cases cited above, except Scofield, antedate Texas Teachers as well as Hewitt v. Helms, 482 U.S. 755

(1987), and Rhodes v. Steward, 488 U.S. 1 (1988) (Per Curiam). Furthermore the courts of appeals which have been presented with the issue in the wake of Texas Teachers have drifted apart. [11/] Compare Romber v. Nichols, 953 F.2d 1152. 1159 (9th Cir. 1992) ("a nominal damage award does not a nominal victory make"); Fassett by and through Fassett v. Haeckel, 936 F.2d 118, 122 (2d Cir. 1991) (fee award appropriate where

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11/ The Fourth and Fifth Circuits have concluded, contrary to the pre-Texas Teachers precedent, that a nominal damage award also cannot confer "prevailing party" status. See Denny v. Hinton, 131 F.R.D. 659, 662-63 (M.D.N.C. 1990), aff'd mem., Denny v. Elliot 937 F.2d 602 (4th Cir.), and aff'd mem. Lawrence v. Hinton, 937 F.2d 603 (4th cir. 1991); Estate of Farrar, 941 F.2d at 1315 (where sole purpose of lawsuit was to recover damages).

nominal damages are recovered for deprivation of an absolute constitutional right) (citing Ruggiero v. Krzeminski 928 F.2d 558, 564 (2d Cir. 1991)) with Estate of Farrar, 941 F.2d at 1315-17 (nominal damage award represents de minimus success where sole purpose of lawsuit was recovery of damages); Spencer General Electric Co., 894 F.2d 651, 651, 662 (4th Cir. 1990) (dicta) (indicating that $1.00 judgment might constitute de minimis success absent any other favorable litigation result); Denny v. Hinton, 131 F.R.D. 659, 662-63 (M.D.N.C. 1990) (nominal damage award constitutes de minimis success), aff'd mem., Denny v. Elliott, 937 F.2d 602 (4th Cir. 1991), and Lawrence v. Hinton, 937 F.2d 603 (4th

Cir. 1991). See also Brewer v. Chauvin, 938 F.2d 860, 864 (8th Cir. 1991) (citing Hogue v. Clinton, 791 F.2d 1318 (8th Cir. 1986)).

As Texas Teachers explains, in order for a claimant to qualify for "prevailing party" status the litigation must achieve, at a minimum, a "material alteration" in the legal relationship between the parties. Texas Teachers, 489 U.S. at 792. The Court in Texas Teachers limned its "material alteration" standard, in broad outline, through reference to two earlier cases, see id. (discussing Hewitt v. Helms, 482 U.S. 755 (1987), and Rhodes v. Stewart, 488 U.S. 1 (1988) (Per Curiam)), to which we now turn.

In Hewitt v. Helms, 482 U.S. 755 (1987), a prison inmate commenced a section 1983 action for damages, as well as delcaratory and injunctive relief, alleging due process violations by prison officials. Helms was released on parole prior to any decision by the district court, and the district court later entered summary judgment against Helms. The Third Circuit reversed on the ground that Helms had been denied due process. The court of appeals ordered the case remanded for entry of judgment in favor of Helms, except as to any defendant determined entitled to qualified immunity. Prior to the actual remand to the district court, however, the defendant prison officials secured a favorable Supreme Court decision

dismissing one of Helms' claims. After remand from the Supreme Court, the Third Circuit reaffirmed its earlier holding on the other due process claim and again remanded to the district court on the issue of qualified immunity. On remand, Helms did not pursue injunctive relief. The district court once again entered summary judgment against Helms, on the ground that the defendants were immune from liability for damages, and denied a fee award under section 1988. The Third Circuit again reversed, on the ground that its earlier interlocutory ruling that Helms' due process rights had been violated constituted significant success.

The Supreme Court disagreed. Justice Scalia pointed out that Helms had obtained no relief whatever on any

claim in litigation -- no judgment, no damages, no injunctive relief, and no declaratory relief. "The most that he obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim." Hewitt, 482 U.S. at 760 (emphasis added). The Supreme Court refused to equate the Third Circuit ruling with declaratory relief, since the interlocutory ruling could not conceivably alter the legal relationship between the parties[12/]

12/ It is to this same discussion in Hewitt, 482 U.S. at 760-61, that the court cites in Texas Teachers, 489 U.S. at 792, to explicate its threshold standard for "prevailing party" status under 42 U.S.C. § 1988. We consider it no happenstance that Texas Teachers and Hewitt both cite to Hanrahan v. Hampton, 446 U.S. 754 (1980) (Per Curiam), and its seminal discussion of the threshold test for "prevailing party" status. See infra at note 13.

in the face of a final judgment "against the plaintiff . . .," id. at 763 (emphasis added), and the litigation resulted in no other "relief" which "affect[ed] the behavior of the defendant[s] towards the plaintiff," id. at 761 (emphasis in original).

We are not persuaded that Hewitt can be considered analogous authority for withholding "prevailing party" status on the ground that a final judgment for nominal damages is no different than the Third Circuit interlocutory ruling declaring a violation of Helms' due process rights. Moreover, as the Court clearly explained in Hewitt:

> Respect for ordinary language requires that a plaintiff receive at least some relief

> on the merits of his claim before he can be said to prevail. See Hanrahan v. Hampton, 446 U.S. 754, 757 (1980). Helms obtained no relief. Because of the defendants' official immunity he received no damages award. No injunction or declaratory judgment was entered in his favor. Nor did Helms obtain relief without benefit of a formal judgment -- for example, through a consent decree or settlement. See Maher v. Gagne, 448 U.S. 122, 129 (1980). The most that he obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim. That is not the stuff of which legal victories are made. Cf. Hanrahan, supra, at 758-59.

482 U.S. at 760.[13/]

13/ In Hanrahan, 446 U.S. at 756-57, the Supreme Court reversed a § 1988 fee award made pendente lite to appellate counsel, on the ground that all rulings favorable to the plaintiffs were interlocutory and procedural. The Court noted that --

(footnote continued)

The Fifth Circuit recently vacated

(footnote continued)

> it seems clearly to have been the intent of Congress to permit such an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal. The congressional Committee Reports described what were considered to be appropriate circumstances for such an award by reference to two cases -- Bradley v. Richmond School Board, 416 U.S. 696 (1974), and Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970). S. Rep. No. 94-1011, [p.] 5 [(1976)]; H.R. Rep. No. 94-1558, [p.] 8 [(1976)]. In each of those cases the party to whom fees were awarded had estiblished the liability of the opposing party, although final remedial orders had not been entered.

Id. at 757 (emphasis added). Texas Teachers, 489 U.S. at 790-92, reaffirms this essential element of the "prevailing party" test which was discussed not only in Hanrahan, 446 U.S. at 757, but in Hewitt, 482 U.S. at 760, as well.

Furthermore, as Hanrahan indicates, in Mills v. Electric Auto Lite Co., 396 U.S. 375 (1970), the Court deemed an interim fee award appropriate once liability had been determined, even

(footnote continued)

a section 1988 fee award to plaintiffs

(footnote continued)

though "the question of relief [would] await further proceedings . . . .; that is, even though no order directing relief had yet been granted. It is particularly noteworthy, we believe, that Mills is cited with approval in the companion Senate Report accompanying § 1988, as well as in the House Report, since the latest Supreme Court pronoucement on the subject states that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." Texas Teachers, 489 U.S. at 793 (emphasis added). Of course, the Hewitt citation to Hanrahan illuminates the reason Helms could not possibly have been granted "prevailing party" status, since he never established entitlement to any relief.

Finally, the Supreme Court observed in Hanrahan:

> It seems apparent from these passages that Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims. For only in that event has there been a determination of the 'substantial rights of the parties,' which

(footnote continued)

whose only relief on the merits of their claims was a judgment for nominal damages, stressing "the principles set forth in [Hewitt] and applied in Rhodes [v. Stewart] . . . ." Estate of Farrar v. Cain, 941 F. 2d at 1311, 1317 (5th Cir. 1991), cert. granted sub nom., arrar v.Hobby, 112 S. Ct. 1159 (1992). With respect, and recognizing the closeness of the question, we would ascribe a somewhat different intendment to the principles enunciated in Hewitt

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(footnote continued)

> Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney.

Hanrahan, 446 U.S. at 757-58 (emphasis added) (quoting H.R. No. 94-1558, p. 8 (1976)).

and applied in Rhodes; that is, as not precluding "prevailing party" status for the claimant who obtains sufficient relief to effect a material alteration in the legal relationship out of which the claim for relief arose. In other words, we think the principles enunciated in Hewitt portend no significant departure from earlier Supreme Court criteria for determining "prevailing party" status on the part of a plaintiff who obtains an enforceable judgment for nominal damages on a significant constitutional claim.[14/]

14/ Prior to Hewitt, the Court held that "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that

(footnote continued)

The other Supreme Court case discussed in Texas Teachers is Rhodes v. Stewart, 488 U.S. 1 (1988) (Per Curiam), a section 1983 action in which two prison inmates obtained a judgment declaring that their First and Fourteenth Amendment rights had been violated by prison officials who failed to comply with prison administrative procedures regulating magazine subscriptions by inmates. The district court judgment ordered compliance and awarded attorney fees. The Sixth Circuit affirmed the section 1988 fee

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(footnote continued)

defendant." Kentucky v. Graham, 473 U.S. 159, 165 (1985) (emphasis added). See also Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719, 738-39 (1980) (overturning § 1988 fee award premised on conduct for which defendants possessed absolute legislative immunity).

award. The Supreme Court reversed, observing that "[t]he case was moot before judgment issued, and the judgment therefore afforded the plaintiffs no relief whatsoever[,]" id. at 4 (emphasis added), since one plaintiff-inmate died and the other was released from custody prior to judgment. Whatever relief other inmates might realize from the judgment,[15/]

15/ In the instant case, notwithstanding that the challenged AF procedures were revised within three months after the filing of the pro se complaint, Domegan does not contend that an informal alteration in the parties' legal relationship was occasioned by the litigation. See Nadeau, 581 F.2d at 281 ("We . . . consider the chronological sequence of events to be an important, although clearly not definitive factor, in determining whether or not defendant can be reasonably inferred to have guided his actions in response to plaintiff's lawsuit."); see also Langton, 928 F.2d at 1225 ("'the mere existence of a temporal coincidence . . .

(footnote continued)

the plaintiffs, as former inmates, realized no relief and, therefore, were not entitled to "prevailing party" status. Id. Thus, we think Rhodes signifies no different result in the present context than would have been required under its predecessor, Hewitt.

At this point in our analysis, as we see it, the baseline standard for "prevailing party" status set out in Texas Teachers has been met. Domegan obtained an enforceable final judgment affording at least some relief against the defendant corrections officials who

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(footnote continued)

cannot alone suffice' to engage the gears of the catalyst test.") (quoting Martinez v. Rhode Island Housing & Mortgage Finance Corp., 628 F. Supp. 996, 1001 (D.R.I. 1986)).

violated his procedural due process rights.[16] Furthermore, we consider the nominal damage award not only "some relief on the merits" of a significant constitutional claim, see Texas Teachers, 489 U.S. at 792 (quoting Hewitt, 482 U.S. at 760),[17]

16/ We recognize, of course, that one dollar is a nominal amount. Yet we cannot think that a nominal damage award does not represent "some relief," particularly where the significance of the constitutional claim and the nature of the established deprivation are not susceptible to monetary measurement. Thus, we believe we must recognize that the nominal damage award does not warrant an inference that the fact-finder intended to minimize the seriousness of the wrong done, or the substantiality of the relief intended, since the intangible nature of the absolute constitutional injury in the instant case is not measurable in monetary terms.

17/ Cf. Walker v. Anderson Elec. Connectors, 944 F.2d 841, 843 n.4 &

(footnote continued)

but relief commensurate with the intrinsically-nonpecuniary procedural due process deprivation established in litigation.[18/]

(footnote continued)

845-47 (11th Cir. 1991) (upholding denial of fee award where Title VII jury found that defendant's sexual harassment had not been the proximate cause of any lost work, thereby precluding even a nominal damage award; where court stated that "an award of nominal damages . . . would make the prospect of obtaining attorney fees much easier . . ."), petition for cert. filed, 60 U.S.L.W. 3800 (U.S. May 8, 1992) (No 91-1794); Warren v. Fanning, 950 F.2d 1370, 1375 (8th Cir. 1991) (where money damages alone were requested, and jury found Eighth Amendment violation, plaintiff "and his counsel . . . have no one to blame but themselves for the jury's decision not to award nominal damages," since they proposed a jury instruction which left any nominal damage award to the discretion of the jury, even though applicable law mandated nominal damage award).

18/ Appellants emphasize that Domegan could not have obtained injunctive or declaratory relief at the time judgment was entered, because the AFP had been

(footnote continued)

b. Purely Technical or de minimis Success

Notwithstanding the majority view

(footnote continued)

revised in 1983 and Domegan had been released from state custody in 1988. Accordingly, relying on Hewitt and Rhodes, and the Fifth Circuit's interpretation of those cases in Estate of Farrar, appellants argue that the judgment in no way affected their behavior toward Domegan. Unlike the plaintiffs in Hewitt and Rhodes, however, Domegan obtained a enforceable judgment for nominal damages redressing appellants' previous violations of Domegan's constitutional rights.

We are satisfied that the intendment appellants attribute the threshold "prevailing party" standard set out in Texas Teachers would work results sufficiently foreign to the developing appellate caselaw under section 1988 as to make its sub silentio adoption by the Supreme Court extremely improbable. Thus, we do not interpret Texas Teachers or its precursors as requiring a material alteration in the future legal relationship between the parties. In circumstances where the wrong occasioned the claimant is

(footnote continued)

prevailing among the courts of appeals --- allowing section 1988 attorney fee awards based on an enforceable judgment for nominal damages --- see supra at pp. 14-16, the residual "prevailing party" standard recently enunciated by a unanimous Court in Texas Teachers concededly given us pause. The opinion cautioned that a district court might conclude that a civil rights claimant was not elibible for "prevailing party" status if the "success [achieved] on a legal claim can be characterized as purely technical or de minimis . . . . Texas Teachers, 489 U.S. at 792. Under

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(footnote continued)

nonpecuniary in nature, we think an award of nominal damages can alter the legal relationship out of which the dispute arose as significantly as a large monetary award can compensate for pecuniary injury.

the de minimis success standard, therefore, we must determine whether an enforceable judgment awarding nominal damages on a procedural due process claim can effect a sufficiently material alteration in the parties' legal relationship to entitle the claimant to "prevailing party" status.

First, we examine the illustration of "purely technical or de minimis success" taken from the Texas Teachers case itself, where the plaintiff teachers' organizations successfully challenged a school policy forbidding teacher meetings during non-school hours absent prior approval from the school principal. The Court hypothesized that plaintiffs would not have qualified for "prevailing party" status on this basis

alone, as "[t]he District Court [had] characterized this issue as 'of minor significance' and noted that there was 'no evidence that that plaintiffs were ever refused permission to use school premises during non-school hours.'" Texas Teachers, 489 U.S. at 792 (quoting App. to Pet. for Cert. 60a n. 26) (emphasis added). Since there was no evidence that the particular school policy ever had been, or would be, applied, their successful challenge did not avail plaintiffs of sufficient "relief" to effect a "material alteration in the legal relationship between the parties." Compare Rhodes, 488 U.S. at 4.

We interpret the Texas Teachers hypothetical to require some justiciable

past, present or impending civil rights deprivation entitling the claimant to relief. Moreover, no matter how comprehensive the "relief" obtained by the claimant, unless the wrong occasioned or threatened by the challenged procedure is "significant" the alteration effected in the overall legal relationship out of which the claim arose will be considered too insubstantial to satisfy the "prevailing party" test. Thus, the success achieved may be ruled purely technical or de minimis if the civil rights violation is either too abstract or too remote in prospect for the "relief" obtained in litigation to have effected a material alteration in the relevant legal relationship between the parties.

The second illustration of "technical or de minimis success" is found in Naprstek v. City of Norwich, 433 F. Supp. 1369 (N.D.N.Y. 1977). See Texas Teachers, 489 U.S. at 792. Some years ago, Nadeau v. Helgemoe, 581 F.2d 275, 279 n.3 (1st Cir. 1978) (Coffin, C.J.), cited Naprstek as a case in which fee shifting would have been inappropriate since "the grounds for attacking an antiquated and rarely enforced curfew statute [were found] to be 'more contrived than real.'" Id. (quoting Naprstek, 433 F. Supp. at 1370) (emphasis added). The Supreme Court in Texas Teachers essentially identified Naprstek as an example of a purely "technical" victory that neither prevented any significant risk of

prospective wrongdoing nor vindicated any genuine previous or contemporaneous wrong.

These exemplars imply qualitative criteria for determining "technical or de minimis" success, requiring careful analysis of the materiality of the relief obtained in litigation to the wrong occasioned the claimant. If the wrong "redressed" was illusory or contrived, even comprehensive "relief" may amount to mere technical or de minimis success.

The third exemplar cited in Texas Teachers is New York City Unemployed and Welfare Council v. Brezenoff, 742 F.2d 718, 724 n.4 (2d Cir. 1984) [hereinafter Brezenoff II], where the destrict court denied a section 1988 award because

plaintiffs' success was considered purely technical or de minimus. In Brezenoff II, the constitutional violations alleged in the complaint were compared with the relief obtained in litigation.[19/] The plaintiff organization and some of its members launched a broadside against the regulatory framework through which

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19/ Although ostensibly Brezenoff II compared the wrongs alleged with the relief obtained, the net effect of its analysis, as in the Texas Teachers hypothetical and Naprstek, correctly resulted in a qualitative comparison between the demonstrated wrong and the relief obtained. We submit that the "degree of success" achieved, which goes to the amount of the fee award, Texas Teachers, 489 U.S. at 790, 793; Nadeau, 581 F.2d at 281, is to be strictly distinguished from the quality of the relief obtained in relation to the nature and significance of the established wrongdoing, which goes to the entitlement to a fee award vel non.

the defendant agency allegedly fettered access to government buildings and restricted organizational activities inside government buildings.[20/]

20/ The complaint charged that four regulations promulgated by the New York City Human Resources Administration infringed the constitutional rights of the plaintiff organization's members "to converse with, distribute leaflets to, and collect contributions from welfare recipients and applicants on the premise of the City's Income Maintenance Centers ('IMCs')." New York City Unemployed and Welfare Council v. Brezenoff, 677 F.2d 232, 234 (2d Cir. 1982) [Brezenoff I]. Plaintiffs failed to demonstrate the unconstitutionality of the challenged regulations narrowly confining organization activities to the first-floor reception areas of the IMCs, requiring a one-day notice of intent to utilize the IMC distribution tables, and banning solicitation of membership fees and contributions inside the IMCs. Instead, a minor provision in one of the four challenged regulations was ruled unduly restrictive; that is to say, insofar as it required all representatives of the plaintiff organization to remain at the IMC tables.

Ultimately, the only relief the plaintiffs obtained was an order requiring that at least one representative be permitted to move freely about the designated IMC reception area. A comparative analysis of the unconstitutional action and the relief obtained demonstrates that the lawsuit effected no material alteration in the relevant legal relationship out of which the litigation arose. The remedial alteration in the legal relationship between the parties amounted to a nick in the agency's regulatory armor. Neither the fabric nor the design of the regulatory framework was altered by the ruling --- hardly an indictment of agency overdrafting --- that one member of each

organization must be allowed to walk about the reception area. Thus, the Court's citation to Brezenoff II illustrates that the success achieved may be considered technical or de minimis if the relief effected too unsubstantial an alteration in the overall legal relationship out of which the litigation arose.

The fourth exemplar offered in Texas Teachers provides similar guidance. In Chicano Police Officer's Ass'n v. Stover, 624 F.2d 127, 131 (10th Cir. 1980), the Tenth Circuit ruled that nuisance settlements do not represent "relief" of the sort required for "prevailing party" status. Its instruction is not unlike that found in a seminal First Circuit case. See

Nadeau, 581 F.2d at 281 (action must not have been "frivolous, unreasonable, or groundless"). Furthermore, it is in the nature of nuisance settlements that the benefits tendered in settlement have less to do with the intrinsic merit of the claim than with the cost of defending against it.[21/]

21/ On the other hand, a conventional settlement of a significant claim may entitle the claimant to "prevailing party" status even in the absence of a final judgment. Maher v. Gagne, 448 U.S. 122, 129 (1980). See Forrest v. New York City Criminal Justice Agency, 549 F. Supp. 211, 213 (S.D.N.Y. 1982) (rejecting defendant's "nuisance settlement" defense to plaintiff's claim for a § 1988 attorney fee award: "Both the amount and the timing of the settlement make clear that it was not a means employed by defendants to be free of a frivolous claim.") (emphasis added); see also Ashley v. Atlantic Richfield Co., 794 F.2d 128, 134 & n.9 (3d Cir. 1986) ("nuisance settlement" inquiry not to be undertaken as part of "prevailing party" determination, but as part of "special circumstances"

(footnote continued)

The next guidepost in Texas Teachers is its admonition that the "degree of success" achieved in litigation goes to the reasonableness of the amount of the award and "not to the availability of a fee award vel non," Texas Teachers, 492 U.S. at 793; id. at 790; that is, not to the "prevailing party" determination. Texas Teachers clearly considers "degree of success" a nonqualitative criterion relating exclusively to the amount of an award, rather than its availability.

(footnote continued)

determination, and stating that "the focus should be on the lack of merit in the plaintiff's case"). Cf. Dowling v. Narraganset Capital Corp., 735 F. Supp. 1105, 1111 (D.R.I. 1990) (stating that one of the purposes behind Fed. R. Civ. P. 9(b), particularly in the context of securities litigation, is to "deter groundless claims that are asserted solely for tactical reasons or for purposes of extracting nuisance settlements") (emphasis added).

Thus, Texas Teachers and its precursors are not prologue to the quantitative "prevailing party" test advocated by appellants. Instead, differences in the degree of success achieved are reflected in the amount awarded; whereas differences in kind, as suggested by the Court's articulation of the residual de minimis success standard ("significance," "materiality"), require qualitative assessments pertaining principally to the claimant's eligibility for a fee award. Throughout its discussion in Texas Teachers, and particularly its references to the "degree of success" achieved in litigation, see id. at 790, 793, the Court appears to intend a quantitative assessment of the claimant's success

only in relation to the reasonableness of the amount of the fee awarded a "prevailing party."

The "prevailing party" criteria endorsed in Texas Teachers inquire whether the plaintiff (i) obtained relief on a significant claim in litigation, (ii) effecting a material alteration in the parties' legal relationship, (iii) that is not merely technical or de minimis in nature. See Texas Teachers, 492 U.S. at 791-93 (emphasis added). Whereas the "degree of success" achieved in litigation may effect the amount awarded, the third criterion for "prevailing party" status superimposes a residual limitary standard on its companion criteria designed to ensure that entitlement to

an award will depend on the qualitative significance of the relief obtained, in terms of its materiality to the legal relationship which occasioned the unconstitutional action.[22/]

Domegan obtained a final judgment for damages on a significant constitutional claim. See Carey v. Piphus, 435 U.S. 247, 266 (1978) (as

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22/ In Brezenoff II, for example, the decree derailing the "walk-about" restriction afforded relief that effected a purely technical alteration in the legal relationship that gave rise to the claims in litigation. The hypothetically-limited relief discussed in Texas Teachers brought no relief, since the requirement of permission to use school premises during non-school hours was never actuated or threatened. Similarly, the putative risk of injury in Naprstek was "'more contrived than real[,]'" Nadeau, 581 F. 2d at 279 n.3, and in Stover the nuisance settlement lacked the required nexus to a significant claim.

procedural due process is an "absolute" right, its denial is actionable without proof of actual injury, because of "the importance to organized society that procedural due process be observed").[23/] Although the monetary damage award is minuscule in amount, in the eyes of the law its remedial significance is

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23/ Carey, 435 U.S. at 266, has never been limited in any Supreme Court case arising under section 1988. See City of Riverside v. Rivera, 477 U.S. 561, 574 (1986) (plurality op.) ("reasonable fee" case, citing to Carey's "nominal damages" discussion in support of Rivera view that "a civil rights plaintiff seeks to vindacate important civil and constitutional rights that cannot be valued solely in monetary terms."); id. at 594 (Rehnquist, J., dissenting) (distinguishing Rivera case from "a case such as [Carey], in which the deprivation of a constitutional right necessarily results in only nominal pecuniary damages.").

substantial, as society recognizes the intrinsic deterrent effect in judgments against public officials who violate procedural due process rights guaranteed under the Constitution. See id. & infra note 32; see also Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 308 n.11 (1986) (stating: Carey "makes clear that nominal damages . . . are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury."). Thus, in these circumstances, the final judgment awarding nominal damages for violations of the inmate-plaintiff's absolute constitutional right to procedural due process cannot be characterized, in any legitimate qualitative sense, as "purely technical or de minimis success."

Furthermore, since the procedural due process deprivation in the present case is not amenable to monetary reparation, a quantitative assessment of the relief obtained in litigation would defeat the congressional intent underlying the principles governing fee shifting in civil rights cases.

The Supreme Court made it abundantly clear in Texas Teachers that the ultimate monitor for the "prevailing party" test is congressional intent. Congress avowedly designed section 1988 to enable private citizens to vindicate civil rights violations in circumstnaces where the unlikelihood of significant financial recoveries would deter their remediation due to the otherwise-unaffordable litigation costs.

If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

. . . .

. . . . [F]ee awards are essential if the Federal statutes to which [§ 1988] applies are to be fully enforced. We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance . . . .

It is intended that the amount of fees awarded under [§ 1988] . . . not be reduced because the rights involved may be non-pecuniary in nature . . . .

. . . If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

S. Rep. No. 1011, 94th Cong., 2d Sess. 2, 5, 6 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5910, 5913. See also Furtado v. Bishop, 635 F.2d 915, 919 (1st Cir. 1980) (emphasizing that § 1988 is meant to finance litigation in cases which apply (rather than create) legal rules, and stating that "pathbreaking holdings that will not be enforced are of limited public value," adding that "the 'principle' of enforcement is served by suits that 'merely' seek damages." (emphasis in original)).

Especially significant in the circumstances of the instant case is Congress' explicit pronouncement that "the amount of fees awarded under [§ 1988] . . . not be reduced because the rights involved may be nonpecuniary

in nature." S. Rep. No. 1011, at 6, reprinted in 1976 U.S.C.C.A.N. at 5913. As the Supreme Court similarly observed, "Congress enacted § 1988 specifically to enable plaintiffs to enforce the civil rights laws even where the amount of damages at stake would not otherwise make it feasible for them to so . . . ." City of Riverside v. Rivera, 477 U.S. 561, 577 (1986) (plurality op.).[24/]

24/ Four years before Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976 (the "Act"), this court reversed a district court order denying a fee award to a successful § 1982 claimant. The reversal was predicated on public policy considerations which were explained as follows:

> The violation of an important public policy may involve little by way of actual damages, so far as a single individual is concerned, or little in comparison with the cost of vindication, as the case at bar

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Unless private citizens are to be

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> illustrates. If a defendant may feel that the cost of litigation, and, particularly, that the financial circumstances of an injured party may mean that the chances of suit being brought, or continued in the face of opposition, will be small, there will be little brake upon deliberate wrongdoing.

Knight v. Auciello, 453 F.2d 852, 853 (1st Cir. 1972) (per curiam).

These very words were quoted four years later on the floor of the United States Senate by the sponsor of the Senate bill subsequently enacted into law as the Act. 122 Cong. Rec. 33, 313-14 (1976) (remarks of Sen. Tunney); see 122 Cong. Rec. 33, 314 (1976) (remarks of Sen. Kennedy) ('[C]ivil rights cases -- unlike tort or antitrust cases -- do not provide the prevailing plaintiff with a large recovery from which he can pay his lawyer."), quoted in Rivera, 477 U.S. at 577 (plurality op.); see also H.R. Rep. No. 1558, 94th Cong., 2d Sess. 9 (1976) (noting importance of fee awards in protecting

(footnote continued)

denied "the opportunity to recover what it costs them to vindicate [their civil] rights in court," S. Rep. No. 1011, at 2, reprinted in 1976 U.S.C.C.A.N. at 5910, contrary to the explicit intent of Congress and the instruction in Texas Teachers,[25/] an enforceable final judgment on a significant constitutional claim which

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(footnote continued)

civil and constitutional rights, given "immunity doctrines and special defenses" which "preclude or severely limit" availability of damages), reprinted in Subcomm. on Constitutional Rights, Senate Comm. on the Judiciary, 94th Cong., 2d Sess., Civil Rights Attorney's Fees Awards Act of 1976: Source Book: Legislative History, Texts, and Other Documents 217 (Comm. Print 1976) [hereinafter Source Book].

25/ Throughout the legislative history of the Act, Congress recognized the need to protect civil rights claimants whose financial circumstances would foreclose litigation aimed at vindicating deprivations of important nonpecuniary

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materially alters the rights and

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rights. S. Rep. No. 1011, at 2, reprinted in 1976 U.S.C.C.A.N. at 5910 ("In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights . . . then [they] must have the opportunity to recover what it costs them to vindicate these rights in court."); H.R. Rep. No. 1558, at 1, reprinted in Source Book 209 (recognizing that it is important that "the judicial remedy [be] full and complete," and stating, "[b]ecause a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts."); Rivera, 477 U.S. at 577 (plurality op.) (quoting floor debate remarks by members of Congress). The remarks of Rep. Hamilton Fish are particularly noteworthy in the present context:

> Without the provision of attorney's fees, it would be very difficult to bring cases such as the following:
>
> . . . .
>
> Fourth. Suits under [42 U.S.C. § 1983 et al.] by inmates of a penitentiary alleging violations of the

(footnote continued)

responsibilities of the parties to the legal relationship in which the claim arose cannot be deemed "purely technical or de minimis" success simply because it vindicates a nonpecuniary deprivation. As we are persuaded that the nominal damage award effected a "material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute," Texas Teachers, 492 U.S. at 792-93 (emphasis added), it cannot be deemed "purely technical or de minimis" success simply because the plaintiff sustained no injury of the sort traditionally considered amenable to compensatory damages.

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inmates' rights under the 1st, 8th, 13th, and 14th amendments.

122 Cong. Rec. 35, 126 (1976) (remarks of Rep. Fish).

C. "Sole Object" Test

Appellants vigorously urge, however, that no fee award should have been allowed, as Domegan did not sue for nominal damages but for substantial compensatory and punitive damages. Relying on Estate of Farrar v. Cain, 941 F.2d 1311 (5th cir. 1991), cert. granted sub nom. Farrar v. Hobby, 112 S. Ct. 1159 (1992), appellants argue that Domegan's inability to establish an entitlement to compensatory or punitive damages required a determination that the nominal damage award represented de minimis success.

Appellants' contention runs counter to the formulation in Texas Teachers, 492 U.S. at 792-93, which precludes consideration of the "degree of success"

in connection with the "prevailing party" test. de Jesus v. Banco Popular de Puerto Rico, 918 F.2d 232, 234 (1st Cir. 1990) (rejecting defendant's attempt to limit "prevailing party" status to plaintiffs "whose damage awards closely approximate the sums sought").[26/]

26/ We fail to see how a material alteration of a legal relationship is made "non-material" through reference to relief not obtained. The corollary -- that a non-material alteration does not become material merely because it represents the full relief sought -- was recognized in Waterman S.S. Corp. v. Maritime Subsidy Bd., 901 F.2d 1119 (D.C. cir. 1990) (EAJA case), where the plaintiffs were deemed prevailing parties on the basis of a district court order remanding their case to the administrative agency. The Court of Appeals for the District of Columbia Circuit reversed on the ground that the order of remand afforded no relief on the merits. The court rejected the contention that a bare remand constitutes some of the benefit sought by a plaintiff whose main purpose in bringing suit was to secure a remand:

(footnote continued)

In Estate of Farrar, 941 F.2d 1311, the

(footnote continued)

> To the extent [it is] argue[d] that the concept of benefit should be proportional to what is sought, we disagree . . . . It would seem absurd to grant fees to [] a party [seeking only a remand], while denying them to a party that differs only in that it asked for a more complete victory . . . and lost on that . . . . Proportionality would come in only after an adequate victory is found and the court considers what share of the fees is reimbursable.

Waterman S.S. Corp., 901 F.2d at 1123; see also Gillespie v. Brewer, 602 F. Supp. 218, 223 (N.D.W. Va. 1985) ("The nature or importance of an action does not vary in proportion to the amount of monetary relief requested.").

Had Domegan sought only nominal damages on his procedural due process claim, there would be no question, under our analysis, that the comprehensive relief obtained through the nominal damage award would be sufficient for "prevailing party" status. Compare Waterman S.S. Corp., 901 F.2d at 1123.

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Fifth circuit did not conclude and, we submit, could not have concluded, in light of Carey and the congressional intent underlying section 1988, that a nominal damage award invariably constitutes de minimis success. Rather, the court held: "when the sole object of a suit is to recover money damages, the recovery of one dollar is no victory under § 1988." Estate of Farrar, 941 F.2d at 1315 (emphasis added) ("This was no struggle over constitutional principles. It was a damage suit and

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That Domegan may have sought compensatory damages, but see infra nn. 28 & 30, would not detract from such a "prevailing party" finding. Of course, as we have stated, adjustment in the amount of the fee award may be appropriate in certain circumstances in response to a great disparity between the damages sought and recovered. See, e.g., Foley v. City of Lowell, 948 F.2d 10, 19-20 (1st Cir. 1991).

surely so since plaintiffs sought nothing more."). 27/

Respectfully, we are unable to agree that a bona fide civil rights action converts to a mere "damage suit" simply by an adjustment to the ad damnum, particularly where the claim can (but need not) be brought only for nominal damages based on an alleged deprivation of an "absolute" constitutional right. See Carey, 435 U.S. at 266; see also Stachura, 477 U.S. at 308 n.11. The present cause of action arose under the United States Constitution and was not converted into

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27/ The Supreme Court rejected the Fifth Circuit's "central issue" test in Texas Teachers, 489 U.S. at 791. In Estate of Farrar, 941 F.2d at 1315, the court formulated its "sole object" test.

a mere tort claim for damages simply because Domegan demanded compensatory relief.[28/] See also Blanchard v. Bergeron, 489 U.S. 87, 96 (1989) (rejecting "the notion that a civil

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28/ We note also that Domegan initially sought declaratory and injunctive relief but properly refrained from pursuing those claims following his release from state custody. Cf., e.g., Rhodes, 488 U.S. at 4 (former inmates not "prevailing parties," as case became moot before entry of judgment for equitable relief); Preiser v. Newkirk, 422 U.S. 395, 402-03 (1975) (inmate's action for equitable relief from wrongful transfer was mooted by retransfer of inmate after filing of complaint; there was no legitimate concern that the wrongful transfer would affect "good time" or parole decisions, and no reasonable expectation that the alleged wrong would be repeated); American Postal Workers Union v. Frank, No. 91-1633, slip op. at 9 (1st Cir. July 6, 1992) ("The presence of viable damages claims . . . does not establish a 'present case or controversy regarding [equitable] relief,' O'Shea [v. Littleton], 414 U.S. [488,] 495-96 [(1974)].").

rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated") (quoting Rivera, 477 U.S. at 574 (plurality op.)).

Domegan did not deny culpability for the disciplinary charges which led to the AFP placement. Instead, he claimed that he was wrongfully placed and kept on the AFP without procedural due process. Accordingly, even if de facto isolation and an inadequate diet had caused provable injury amenable to monetary compensation, Domegan could not have established an entitlement to compensation for the substantive deprivation.[29/]

29/ Domegan asserted Eighth Amendment claims, and companion substantive due process claims, for damages allegedly sustained as a consequence of the wrongful procedural placement on AFP and other AFP-related conduct by prison officials. The jury found for the defendants on these claims. Under Texas Teachers, Domegan's lack of success on those claims, and thus on a large part of his complaint, goes to the degree of success and the amount of the § 1988 award, not its availability. See Texas Teachers, 489 U.S. at 792.

See Carey, 435 U.S. at 260, 263; Rodriguez de Quinonez v. Perez, 596 F.2d 486, 491 (1st Cir.), cert. denied, 444 U.S. 840 (1979). The only wrong occasioned Domegan was the unconstitutional denial of his absolute right to procedural due process. Although a civil rights plaintiff may demand compensatory damages for mental and emotional distress resulting from a procedural due process deprivation,[30/] see Carey, 435 U.S. at 263-64 (damages for mental and emotional distress);

30/ Domegan demanded compensatory damages aggregating $50,000 in connection with all his federal constitutional claims and the state law claim. Moreover, the special verdict form indicates that the entire $350,000 punitive damage demand related to the Eighth Amendment claim.

Maldonado Santiago v. Velazquez Garcia, 821 F.2d 822, 829 (1st Cir. 1987) (same), monetary damages are not presumed to flow from the violation. Carey, 435 U.S. at 260-64; id. at 263 ("[W]here a deprivation is justified but procedures are deficient, whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure.").[31/]

31/ This is in noteworthy contrast to certain other constitutional violations resulting in nonpecuniary injury, such as deprivations of the right to vote, for which presumptive damages may be recoverable for the definite, though not readily measurable, harm presumed to flow from the bare violation. See Stachura, 477 U.S. at 310-11 & 311 n.14 (discussing Nixon v. Herndon, 273 U.S. 536 (1927), and other cases); Carey, 435 U.S. at 264-65 & 265 n.22 (emphasizing that "elements and prerequisites for recovery" for one constitutional deprivation are not necessarily

(footnote continued)

d. Summary

Supreme Court analysis on the sufficiency of the relief obtained in litigation invariably centers on its capacity to redress real wrongdoing. The Supreme Court has never ruled (nor adverted with approval to a case which has held) an award of fees improper under section 1988 merely because the

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(footnote continued)

appropriate for another; discussing voting rights cases); see also Walje v. City of Winchester, Kentucky, 827 F.2d 10, 12-13 (6th Cir. 1987) (presumed damages available for First Amendment deprivation not involving the right to vote); City of Watseka v. Illinois Pub. Action Council, 796 F.2d 1547, 1559 (7th Cir. 1986) (presumed damages for deprivation of First Amendment solicitation rights), aff'd, 479 U.S. 1048 (1987). But Cf. Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620, 639 (1st Cir. 1990) (upholding nominal damage award in First Amendment case where plaintiff offered no proof of damages), cert. denied, 112 S. Ct. 865 (1992).

monetary relief obtained in litigation was de minimis in amount. All cases adverted to in Texas Teachers involved circumstances in which the wrong established was more illusory than real, or the relief obtained in litigation was so insubstantial in relation to the relevant legal relationship as to be considered "purely technical or de minimis. " Thus, "prevailing party" status in the instant case was neither precluded by the inability to obtain a compensatory damage award on the procedural due process claim, nor by the failure to establish liability on other claims, which are matters appropriately considered in assessing the reasonableness of the fee award. See Texas Teachers, 489 U.S. at 793; de

Jesus, 918 F.2d at 234 (citing Texas Teachers).

Were we to conclude that a nominal damage award in a civil rights action based on a nonpecuniary deprivation represents mere de minimis success, we would rule out fee shifting under section 1988 notwithstanding that the claimant recovers an enforceable judgment on a significant constitutional claim. We find no warrant in Supreme Court caselaw for doing so. See Carey, 435 U.S. at 266 (procedural due process deprivation is actionable without proof of injury because the right to procedural due process is "absolute," and "because of the importance to

organized society that procedural due process be observed.");[32/] see also Stachura, 477 U.S. at 380 n.11 (nominal damage award appropriate to vindicate rights whose infringement causes no "actual" injury). Thus, we do not understand Texas Teachers to condone (let alone require) disentitlement to "prevailing party" status merely because the final judgment redressing a procedural due process violation awards only nominal damages.

A nominal damage award based on a denial of the predeprivation process due

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32/ Significantly, the Court noted in Carey that "the potential liability of § 1983 defendants for attorney's fees . . . provides additional --- and by no means inconsequential --- assurance that agents of the State will not deliberately ignore due process rights." Carey, 435 U.S. at 257 n.11.

the claimant whose culpability is later conceded presents a tantalizing candidate for characterization as "technical or de minimis success." Yet to do so would be to conclude that the constitutional violation itself was de minimis, which cannot be done under current Supreme Court caselaw, see, e.g., Carey, 435 U.S. at 266, our own precedent, see, e.g., Perez v. University of Puerto Rico, 600 F.2d 1, 2 (1st Cir. 1979), or the congressional intent underlying section 1988. We therefore conclude that "prevailing party" status is appropriate where the claimant establishes a significant procedural due process deprivation and obtains an enforceable nominal damage award against the responsible public officials.

2. Special Circumstances

Appellants argue that Domegan is entitled to no fee award, because he allegedly exhibited an "inexcusable reaching for fees" by submitting an inflated fee application. See Lewis v. Kendrick, 944 F.2d 949, 958 (1st Cir. 1991) (on rehearing).[33/] In Lewis, we denied a fee award where the application reflected (1) no "good faith" effort to exclude excessive, redundant, or otherwise unnecessary hours, (2) no reduction for time spent on unsuccessful claims, and (3) no

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33/ As the present claim is raised for the first time on appeal, we review for "plain error" indicative of "a 'clear miscarriage of justice' . . . ." Playboy Enterprises, Inc. v. Public Serv. Comm'n., 906 F.2d 25, 40 (1st Cir.) (quoting Brown v. Trustees of Boston Univ., 891 F.2d 337, 359 (1st Cir. 1989), cert. denied, 111 S. Ct. 388 (1990)).

allowance for the limited "degree of success" achieved by the plaintiff. Id. at 957-58 (relying on Hensley v. Eckerhart, 461 U.S. 424, 434, 436 (1983)). On the other hand, the present fee request reflects reasonable regard for the concerns expressed in Lewis, as evidenced in part by the fact that the number of hours for which compensation was requested approximates only one third of the hours counsel devoted to the litigation. These self-imposed, pre-application cuts substantially anticipated virtually all of appellants' present contentions.[34/]

34/ An examination of certain objections raised by appellants demonstrates that the fee application was prepared with no purpose to inflate fees. For instance, appellants suggest that Procter & Hoar's over-staffing and personnel changes caused "a spate of conferences, cross-conferences, drafts, revisions,

(footnote continued)

Appellants contend that the fee

(footnote continued)

edits of other people's drafts and revisions, etc., for which plaintiff sought compensation." Our review of the application allays any such concerns. Approximately 267 of the 352 time entries in the fee application pertain to services performed by the lead partner and the primary associate who took charge of the litigation several years after Procter & Hoar was appointed. Moreover, the application pares the total hours billed, in recognition of the fact that "some of the time billed was redundant, owing to unavoidable changes of staffing on the case, or was less efficient than it might have been because some assignments were given in the first instance to law clerks and interns."

Appellants further contend that the fee request was inflated, because, they say, virtually the entire trial was dedicated to litigating the unsuccessful claims, lead trial counsel sought compensation for more than ten hours daily even though the trial was conducted on a half-day basis, and compensation was requested for two trial attorneys. Nevertheless, it was not improper to request compensation for the trial time spent securing the due process nominal damage award. In recognition of the lack of success on

(footnote continued)

application inadequately reflected the

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the other claims, compensation was requested for only one third of the trial time. Contrary to appellants' suggestion, moreover, we do not find the pretrial discovery entries excessive, nor, for the most part, inclusive of work for which compensation should not have been sought. Virtually all of the discovery services for which compensation was requested (including the deposition of a Department of Correction nutritionist and the interrogatories propounded to victorious defendants) were not plainly unrelated to the successful due process claim, in support of which evidence was needed to establish the existence and nature of the due process deprivation. See infra note 40.

Appellants point to a handful of "mixed" entries pertaining to amendments to the complaint which are not compensable because they related to unsuccessful claims (even though each entry included some compensable services as well). Likewise, a number of other "mixed" entries relating to unsuccessful claims should not have been included in the fee application. But for these minor exceptions, however, the fee application accorded due regard to the requirement that compensation not be sought for services rendered on

(footnote continued)

limited "degree of success" achieved in litigation, as demonstrated by the sizeable reduction imposed by the district court, and, therefore, that the total compensation requested was inflated. Our review discloses, however, that appellants neither identify any substantial failure of "reasonable compliance with the judicial pronouncements" relating to fee requests, Lewis, 944 F.2d at 958 (on rehearing), nor challenge the veracity of the time sheets or the supporting affidavits. Although we conclude that

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(footnote continued)

unsuccessful claims. In all fairness, we canot conclude that these lapses in precision fee-cutting approached those involved in Lewis, such that the present award again should be slashed under the "special circumstances" test.

further reductions are required, we discern no basis for questioning the bona fides of the fee application under the "special circumstances" exception.

3. Size of the Award

The fee application requested an award totaling $86,016.80 for legal services performed during the five-year period spanned by the litigation. The district court found "the rates and hours charged for various aspects of the case to be reasonable,"[35/]

35/ The only appellate challenge to the reasonableness of these hourly rates asserts that the district court was required to compensate counsel at different rates for different services, but instead allowed a flat hourly rate for all legal services performed by the same attorney. We do not accept Domegan's contention that appellants waived their right to contest the reasonableness of the fee award on this basis by reason of their failure to present evidence as to reasonable hourly

(footnote continued)

but halved the request to reflect the

(footnote continued)

rates. Cf. Blum v. Stenson, 465 U.S. 886, 892, n.5 (1984) (failure to present evidence supporting challenge to the "accuracy and reasonableness of the hours charged"). Nevertheless, their failure to present evidence that the flat rates approved by the district court were unreasonable means that appellants cannot prevail on their "flat rate" challenge. Since the "botton line" is a reasonable fee award, their "flat rate" challenge cannot succeed unless appellants show that the flat rates allowed by the district court were not reasonable average rates for the types of legal services determined compensable by the district court. We do not think appellants can manage their burden without establishing the hourly rates which they would propose be used in place of the flat rates approved by the district court, especially since the approved rates do not appear excessive on their face. Although appellants contend that flat rates are impermissible as a matter of law, we have never indicated as much, see infra p. 52; nor do we believe it necessary to reach the issue on the present record. See Foley v. City of Lowell, Mass., 948 F.2d 10, 21 (1st Cir. 1991) (Where "a fee target has failed to offer either countervailing evidence or persuasive argumentation in support of its

(footnote continued)

limited degree of success achieved in litigation. See Hensley, 461 U.S. at 434-37. The $41,441.55 award purportedly allowed compensation only for the 388.5 hours "explicitly spent on the due process issue, the summary judgment motion, and the [interlocutory] appeal . . . ."

We review the reasonableness of the attorney fee award for abuse of

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(footnote continued)

position, we do not think it is the court's job [] to do the target's homework . . . .").

We likewise reject the contention that appellants failed to preserve their challenges to particular hours billed, by failing to present countervailing evidence below. These challenges -- founded primarily on caselaw, the insufficiency of the billing entries, and argumentation based on the circumstances in the present case -- did not depend on evidentiary support.

discretion, finding an abuse "'when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.'" Foster v. Mydas Assoc., Inc., 943 F.2d 139, 143 (1st Cir. 1991) (quoting Independent Oil & Chem. Workers of Quincy, Inc. v. Proctor & Gamble Mfg. Co., 864 F.2d 927, 929 (1st Cir. 1988)). "District courts have discretion when awarding fees and expenses under 42 U.S.C. § 1988, [Hensley], and appellate courts accord deference to the exercise of that discretion." Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 950 (1st Cir. 1984). The district court enjoys broad

discretion in setting the amount of an attorney fee award. de Jesus v. Banco Popular de Puerto Rico, 951 F.2d 3, 5 (1st Cir. 1991) [hereinafter de Jesus II]; United States v. Metropolitan Dist. Comm'n, 847 F.2d 12, 14 (1st Cir. 1988). On an "abuse of discretion" review, the basis for the fee award is to be reviewed carefully, and we must ensure that the amount is reasonable, but "we normally prefer to defer to any thoughtful rationale and decision developed by a trial court and to avoid extensive second guessing." Grendel's Den, 749 F.2d at 950.

a. Disproportion

Appellants contend that the attorney fee award is grossly disproportionate to the one dollar

damage award, particularly in light of the damages demanded. The amount of the monetary recovery is "certainly [a] relevant" factor to be considered in setting the size of an attorney fee, Rivera, 477 U.S. at 574 (plurality op.); Foley, 948 F.2d at 19-20 (amount of damages relevant to determination of reasonable fee; fee may be reduced when amount of damages sought is large but recovery small); Home Placement Serv., Inc. v. Providence Journal Co., 819 F.2d 1199, 1210 (1st Cir. 1987) ("recovery of only nominal damages can be cause for reducing a fee award if the litigation is not otherwise significant") (Clayton Act case); Perez, 600 F.2d at 2 (nominal damage award one factor that may affect amount of fee).

Novertheless, disproportion alone does not render an award unreasonable, Rivera, 477 U.S. at 574 (plurality op.); id. at 585 (Powell, J., concurring); Foley v. City of Lowell, Mass., 948 F.2d 10, 20 (1st Cir. 1991) (reasonable fee may exceed damage recovery "several times over"), and a judgment for nominal damages may warrant a substantial fee award. Aubin v. Fudala, 782 F.2d 287, 290-91 (1st Cir. 1986) (suggesting intrinsic value in "simple declaration of violations of federal law."); Perez, 600 F.2d at 2 n.2 (policy of awarding nominal fees for recovery of nominal damages would "handicap those seeking to assert civil rights to the same extent as denying fees altogether"); see also Ruggiero v. Krzeminski, 928 F.2d 558,

564 (2d Cir. 1991) (upholding $12,833.34 fee based on $1.00 damage award); Allen v. Higgins, 902 F.2d 682, 684-85 (8th Cir. 1990) ($10,000 fee based on $1.00 damage award); Home Placement Serv., 819 F.2d at 1212 (awarding $16,989 for portion of litigation relating to nominal damage award); McCann v. Coughlin, 698 F.2d 112, 129 (2d Cir. 1983) (that successful procedural due process claimant who recovered $1.00 damage award did not warrant reduction in attorney fee award of almost $50,000).[36/]

36/ Of course, the "degree of success" achieved in litigation is a "critical" factor in fixing the amount of an award under section 1988. Texas Teachers, 489 U.S. at 789-90 (discussing Hensley). Appellants do not contend, however, that the district court failed to reduce the fee request to reflect the recovery of only a nominal damage award on the

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b. Summary Judgment

Appellants argue that the district court should not have allowed compensation for all legal services attributed to the summary judgment proceedings, since a significant portion

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procedural due process claim and the lack of success realized on the other claims in litigation. Rather, even though the court reduced the number of compensable hours from 808.3 to 388.5 for these purposes, appellants still contend that the "extraordinarily high award" constituted an abuse of discretion. As we find no abuse of the district court's broad discretion --- based on the disproportion between the fee and damage awards --- see Nydam v. Lennerton, 948 F.2d 808, 813 (1st Cir. 1991) (appellate court will not interfere "'[w]here . . . [a] district court [has] carefully weighed the correct factors and arrived at a result within a supportable range....'") (quoting Wojtkowski v. Cade, 725 F.2d 127, 131 (1st Cir. 1984)), we turn to appellants' demands for further reductions relating to fees for particular services.

went toward the unsuccessful Eighth Amendment claims, which appellants assert were wholly distinct from the successful due process claim. See Hensley, 461 U.S. at 434-35 (no compensation allowable for services on unsuccessful claims segregable from successful ones); Wojtkowski v. Cade, 725 F.2d 127, 130 (1st Cir. 1984) (same). The district court implicitly determined, however, that the due process and Eighth Amendment claims were interrelated.[37/]

37/ After observing that "a one dollar award constitutes rather less than a resounding victory," the district court opinion quoted the following passage from Hensley:

> If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true

(footnote continued)

As its interrelatedness finding is

(footnote continued)

even where the plaintiff's claims were interrelated, non-frivolous, and raised in good faith.

Hensley, 461 U.S. at 436 (emphasis added). The section of the majority opinion from which the quoted excerpt is taken provides instruction on the proper approach to fee applications for legal services on interrelated, nonsegregable claims where the claimant achieved limited success in litigation.

We think it clear, therefore, that the district court recognized the interrelatedness of these claims. The court awarded compensation for "only those hours explicitly spent on the due process issue, the summary judgment motion, and the [defendants' interlocutory] appeal (including research on qualified immunity issues) . . . ." As we understand the district court award, since Domegan's "success [on the interrelated claims] may fairly be characterized as 'limited,'" attorney fees were awarded only for the legal services in connection with the summary judgment litigation and the interlocutory appeal. Additionally, legal services specifically devoted to the due process claim (i.e., any such services which could be separated out) were determined compensable, as that was the only claim on which Domegan "garnered [any] success." See also infra n.40.

adequately supported in the record,[38/] we see no abuse of discretion in the district court decision to forego the request to separate the time spent on interrelated claims where it would have been largely impracticable to do so. Aubin v. Fudala, 821 F.2d 45, 47 (1st Cir. 1987) [hereinafter Aubin II]; see

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38/ For example, even though the due process and Fifth Amendment claims differed, the "Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment" reveals that they arose out of the same circumstances, and both concerned Domegan's placement on the AFP. Although not all material facts are common to both claims, the core facts are common. Moreover, both claims were dependent on the factual investigation and legal research underlying the portion of the summary judgment memorandum relating to the direct and supervisory liability of the individual appellants.

Hensley, 461 U.S. at 435-36 (focusing on overall success when different claims are legally or factually intertwined); Nydam v. Lennerton, 948 F.2d 808, 812 (1st Cir. 1991) (no abuse of discretion where district court determined that successful and unsuccessful claims arose from core of common facts); Fishman v. Clancy, 763 F.2d 485, 491 (1st Cir. 1985) (same); see also Nydam, 948 F.2d at 813 (appellate court will not interfere "'[w]here . . . [a] district court [has] carefully weighed the correct factors and arrived at a result within a supportable range . . . .'") (quoting Wojtkowski, 725 F.2d at 131).

Appellants point to certain time-sheet entries which reflect services devoted to the successful "due

process" claim or the unsuccessful Eighth Amendment claim.[39/] Of course, the interrelatedness finding is not undermined simply because it may have been practicable to discern some further, partial distinction between the services rendered on successful and unsuccessful claims. See Wagenmann v. Adams, 829 F.2d 196, 225 (1st Cir. 1987) (upholding interrelatedness finding, noting clearly segregable item on billing sheets); see also Aubin II, 821 F.2d at 47 ("It might

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39/ Only one of these time-sheet entries was approved in connection with the fee award for summary judgment services, an entry for 3.8 hours spent on the due process and Eighth Amendment claims, and the facts section of Domegan's summary judgment memorandum. We adjust for this entry (# 111) as indicated below. See infra note 44.

not have been practical for the lawyers to allocate each hour among the several factually related legal claims.") (emphasis added). For example, a billing entry which distinguishes between legal research on different claims does not necessarily enable a clear allocation of fees where the different claims are factually intertwined. See, e.g., supra note 39. As these summary judgment claims were interrelated,[40/]

40/ Appellants urge that these claims were entirely separate, due to the fact that the Eighth Amendment claim concerned so-called "substantive conditions of confinement" while on the AFP, whereas the due process claim dealt with "procedural issues before implementation of the AFP." However, as Domegan points out, one of the summary judgment disputes turned on whether due process protection attached, which depended on whether appellants' actions constituted punishment as distinguished from mere

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appellants' complaint that compensation should not have been allowed because the time entries might have distinguished more sharply between the due process and Eighth Amendment claims is unavailing in the present circumstances. See Rivera, 477 U.S. at 570 n.4 (plurality op.) ("[W]hile it is true that some of the disputed time records no not identify the precise claims worked on at the time, we find this lapse unimportant, in

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(footnote continued)

administrative restraint. The due process portion of the summary judgment memorandum therefore focused in part on the nature of the deprivations caused by the AFP placement, and the lack of a sufficient administrative rationale for the deprivations. ("Nutritionally deficient and unvaried meals in no way advance the interest in preventing health hazards caused by thrown food and waste."). Thus, this section of the memorandum did rely on evidence as to the conditions of confinement while Domegan was on the AFP.

light of the District Court's finding that all of respondents' claims were interrelated.").

The award of fees for professional services in the summary judgment proceedings must also be viewed in the context of the award as a whole. The district court awarded fees only for pretrial summary judgment services, the interlocutory summary judgment appeal, and the services specifically related to the due process claim. Consequently, due to the interrelatedness of the Eight Amendment and due process claims, as a practical matter essentially no fee award was made for virtually all legal services devoted to pretrial discovery and to the trial itself, since such entries did not distinguish among

interrelated claims. Furthermore, with the exception of the time devoted to the summary judgment proceedings and the related interlocutory appeal, the district court rationale ensured that counsel were penalized for any failure to segregate successful and unsuccessful claims on their billing sheets. Thus, the district court rationale affords counsel a substantial inducement to maintain detailed time records, wherever practicable clearly delineating the particular claims and issues to which the legal services related. See Hensley, 461 U.S. at 437 (billing records should enable court to identify distinct claims); see also Grendel's Den, 749 F.2d at 952 (substantial fee reduction appropriate if detailed

contemporaneous time records not kept); Wojtkowski, 725 F.2d at 130 (billing sheets should distinguish between particular issues); Nadeau, 581 F.2d at 279 (same).

Careful review reassures us that the district court tailored its total award to reflect the value of the legal services in light of the time reasonably required for their performance and the degree of success achieved.[41/] Gabriele v. Southworth, 712 F.2d 1505, 1507 (1st Cir. 1983) ("Nor should the

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41/ In response to the limited "degree of success" achieved in litigation, the district court halved the fee request, even though the request sought compensation only for about one third the total time counsel devoted to the case. Cf. Home Placement Serv., 819 F.2d at 1211-12 (awarding 50% of fees related to portion of litigation in which nominal damages were obtained).

judge become so deluged with details that [s]he is unable to view the claims for fees in perspective. [S]he must retain a sense of overall proportion."). There was no abuse of discretion in determining the number of compensable hours. See United States v. Metropolitan Dist. Comm'n, 847 F.2d 12, 17 (1st Cir. 1988) (separation of "wheat from chaff" in fee award context is, "within broad limits," a matter for the district court's discretion).[42/]

42/ Appellants argue that the district court should have disallowed fees for legal services on the unsuccessful due process claims against their codefendants. Yet appellants propose no practicable method for doing so. See Cobb v. Miller, 818 F.2d 1227, 1233-34 (5th Cir. 1987) (reversing fee-reduction order where plaintiff succeeded on but one of three interrelated claims against different defendants: interrelated claims did "not arise from a course of conduct that is easily differentiated on

(footnote continued)

c. Uniform Hourly Rates

Appellants assert error in the district court's approval of a uniform hourly rate for all legal services performed by each attorney regardless of the nature of the services rendered (e.g., research, conferencing, court appearances). In Maceira v. Pagan, 698

(footnote continued)

the basis of each defendant."). The only significant summary judgment services which might conceivably have been distinguished on such a basis would have been legal research and drafting related to the supervisory liability of the appellants, as distinguished from their victorious codefendants. As for any other services which might have been distinguished on the basis of the particular defendant involved, (e.g., pretrial discovery), the district court allowed no compensation. In sum, appellants have failed to demonstrate that the fee award includes compensation for any significant, readily-segregable services specifically relating to the victorious codefendants.

F.2d 38, 41 (1st Cir. 1983), we noted that, "while Miles v.Sampson, [675 F.2d 5, 9 (1st Cir. 1982),] upon which [appellants] rel[y], indicates the importance of using more than one rate when appropriate, it does not hold that differential rates are always required." Maceira, 698 F.2d at 41 (citing cases) (emphasis in original). Although it would have been within the bounds of the district court's broad discretion to assign differential rates for various legal services, appellants proposed no alternate rates and submitted no evidence that the rates charged by Procter & Hoar were not reasonable. We find no abuse of discretion in the decision to forego differential rates in these circumstances.

d. Excessive Hours

Appellants contend that the 247 hours attributed to the summary judgment litigation, and the 152 hours to the related interlocutory appeal, were excessive. The hours determined compensable by the district court do not appear excessive on their face and no particular rationale is assigned in support of the allegation of excessiveness as it relates to the summary judgment litigation. We recognize that the district court was better situated to evaluate whether the time spent on these services was reasonably necessary. See Foley, 948 F.2d at 19 ("[A]n appellate tribunal lacks the means to replicate the trial court's first-hand knowledge of the

litigation and its nuances."); Wagenmann, 829 F.2d at 224-25 (district court "has far greater familiarity than do we with how much was done, who did it, and how effectively the result was accomplished"); Chalmers v. Los Angeles, 796 F.2d 1205, 1211 (9th Cir. 1986) ("The district court is in the best position to determine in the first instance the number of hours reasonably expended in futherance of the successful aspects of a litigation."). We therefore defer to the district court's informed judgment that the hours devoted to "various aspects of the case" were reasonably efficient and necessary.[43/]

43/ Appellants attempt to assign grounds for their contention that too much time was spent on the interlocutory appeal;

(footnote continued)

e. Challenges to Particular Time-sheet Entries

Appellants contend that the fee

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we find none convincing. First, their contention that the request was excessive because Procter & Hoar did not need to compile the appendix for the interlocutory appeal (for which the district court allowed 1.5 hours of compensable time) is an insufficient basis for finding that other, necessary interlocutory appeal services (research and drafting) did not reasonably require as much time as claimed. Second, we find particularly unconvincing appellants' overall plaint of excessiveness, as well as their direct attack on the services performed by one attorney whose (minimal) time was spent largely in researching interlocutory appellate jurisdiction, especially since appellants had attempted to present appellate claims not subject to interlocutory appeal. See infra, pp. 54-55. The additional time reasonably spent successfully resisting appellants' attempts to assert appellate jurisdiction where none existed is fully compensable. Although appellants advance several other objections to the reasonableness of the hours determined compensable by the district court, we find none of sufficient moment to warrant discussion.

award, contrary to the district court's own criteria, includes compensation for services not devoted to the summary judgment litigation, the interlocutory appeal, or the procedural due process claim. Appellants contest the allowance of compensation based on certain "mixed" entries which appear to combine hours devoted to compensable and noncompensable services.

Our concerns about ambiguous time-sheet entries are well recognized. See, e.g., Furtado v. Bishop, 635 F.2d 915, 922 (1st Cir. 1980) (disallowing compensation for "Conf[erence] G. Sousa and travel," since the entry did not indicate the time spent in conference and "we are disinclined to compensate an

attorney at professional rates for travel time . . . ."). Accordingly, we have culled out, for disallowance on these grounds, various "mixed" entries to which appellants have called our attention, totaling $3,502.60.[44/] In other respects, we find that the district court's handling of various "mixed" time entries was well within its broad discretion. Metropolitan Dist. Comm'n, 874 F.2d at 17 (separation of "wheat from chaff," "within broad

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44/ Thus, all compensation is denied for the services identified in the following entries: ## 36, 69, 97, 111, 124, 182, 190, 192, 195, 206, and 207; totaling 37.8 hours.

limits," is within the discretion of the district court).

Appellants challenge an apparent allowance of compensation based on "at least three" entries for research relating to interlocutory appellate review. As the defendant state officials unquestionably were entitled to an interlocutory appeal from the denial of their motion for partial summary judgment on qualified immunity grounds, appellants insist that no interlocutory appeal research was necessary. We remind appellants that there were two other appellate claims which they had no right to present on interlocutory appeal. See Domegan v. Fair, 859 F.2d 1059, 1061-62 (1st Cir. 1988) (no interlocutory appeal permitted

on two of appellants' three claims). We have been given no reason to believe that the services rendered in connection with these three entries were unnecessary.[45/]

f. Computational Errors

Finally, appellants assign errors in the computation of the award, which require that the award be reduced by $165.60 (2.4 hours at $69.00 per hour); $295.00 (5.9 hours at $50.00 per hour);[46/]

45/ A fourth billing entry involved "[r]esearch on appealability of qualified immunity ruling." The 1.7 hours billed for this entry seem entirely reasonable, as does the .3 hour entry for a conference on the motion to dismiss the appeal and research on appellate jurisdiction.

46/ The district court apparently allowed 8.3 hours for services relating to liability issues at the pretrial

(footnote continued)

$484.50 (5.1 hours at $95.00 per hour), and increased by $90.00 (1 hour at $90.00) and $40.00 (.4 hours at $100.00).[47/]

The attorney fee award is reduced to $37,123.85. The district court judgment is affirmed, as modified; costs to appellee.

(footnote continued)

discovery stage which had no connection with the interlocutory appeal or with qualified immunity. The award is reduced accordingly.

47/ The district court allowed 55.0 hours at $95.00 per hour for services by Attorney Bagger. As appellants point out, the fee application claimed that Ms. Bagger spent 49.1 hours of compensable time (on summary judgment and the interlocutory appeal) at the $95.00 hourly rate. Our review of the fee request and time sheets indicates that she actually devoted 49.9 hours, but that other minor miscalculations necessitate the net adjustment set forth in the text.

- Concurrence Follows -

CAMPBELL, Senior Circuit Judge (Concurring). I join in Judge Cyr's exceedingly thoughtful opinion. Even if one were not fully persuaded, the result is dictated by this Circuit's prior precedent and our panel is bound by state decisis. The Supreme Court will presumably decide the matter definitively next term in Farrar v. Hobby.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 83-2385-Z

DENNIS J. DOMEGAN

vs.

JOSEPH J. PONTE, Superintendent, MCI-Walpole; FRANK LEPPERT, Lt., PETER GALLAGHER, Lt., ANTHONY SILVA, Sgt., JAMES BROOKS, Sgt., CARL HARRISON, PATRICK SMITH, GARY MENDES, BRIAN BISSONNETTE and CHRISTOPHER PIRES, all Correctional Officers, Massachusetts Department of Correction, Individually and in their Official Capacities

MEMORANDUM AND ORDER

ZOBEL, D.J.

Plaintiff Dennis Domegan brought this § 1983 action against the defendant officials and correction officers, alleging that they had violated his constitutional rights under both the Eighth and Fourteenth Amendments by placing him on the Alternative Feeding Program. Although he won a motion for

partial summary judgment on his due process claim against defendants Joseph J. Ponte, Frank J. Leppert, and Gallagher, and survived their appeal from it on qualified immunity grounds, at trial the jury awarded him only one dollar in damages. It further found for defendants on his Eighth Amendment and state law claims. Plaintiff now seeks attorneys' fees as the prevailing party, pursuant to 42 U.S.C § 1988 (1988), in the amount of $88,655.16. Defendants oppose his request, both in its entirety, arguing that his success was de minimis under Texas State Teachers Ass'n v. Garland Indep. School Dist., 489 U.S. 782 (1989), and in certain particulars, arguing that the number of hours charged is excessive, again in light of his limited success.

Defendants' argument against any fee award fails. The determination that plaintiff's due process rights were violated by them changed his legal relationship to them such that he "has crossed the threshold to a fee award of some kind." Texas Teachers, 489 U.S. at 792; see also Ruggiero v. Krzeminski, 928 F.2d 558, 564 (2d Cir. 1991) ("Although no compensatory damages were awarded, the jury's determination 'changes the legal relationship' between the [plaintiffs] and the [defendants] in that a violation of rights had been found."). Plaintiff's success on the due process claim was not "purely technical or de minimis," Texas Teachers, 489 U.S. at 792, and therefore unworthy of a fee award, despite the

nominal damages. The example of a technical victory which the Court gives and the cases it cites to support the language in Texas Teachers upon which defendants rely illustrate clearly that "de minimis" applies to the significance of the successful claim in the overall litigation, not the amount of the damages awarded.[1/] As one of the two theories of plaintiff's case, the due process claim was significant in relation to the remainder of the litigation.

Nevertheless, a one dollar award constitutes rather less than a

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1/ For a different reading of the phrase "de minimis" in Texas Teachers, see Denny v. Hinton, 131 F.R.D. 659, 663 (M.D.N.C. 1990) (one dollar judgment for plaintiff de minimis; plaintiff's motion for attorney's fees denied).

resounding victory for plaintiff. "If . . . a plaintiff had achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith." Hensley v. Eckerhart, 461 U.S. 424, 436 (1983). Although I find the rates and hours charged for various aspects of the case to be reasonable, plaintiff's success may fairly be characterized as "limited" and a reduction in the fees he has requested is appropriate. He garnered no success on any claim except the one for due process, and his successes on that claim

came only on his motion for summary judgment and defendants' appeal from that decision. As a result, only those hours explicitly spent on the due process issue, the summary judgment motion, and the appeal (including research on qualified immunity issues) will be compensated. Defendants will also be taxed for the costs of service of process and travel.

On this basis, I allow the following fees:

Paul E. Nemser	$145	x	44.1 hrs.	=	$ 6,394.50	
	$150	x	46.8 hrs.	=	$ 7,020.00	
	$155	x	44.1 hrs.	=	$ 6,835.50	
						$20,250.00
Paula M. Bagger	$ 90	x	43.2 hrs.	=	$ 3,888.00	
	$ 95	x	55.0 hrs.	=	$ 5,225.00	
	$100	x	55.3 hrs.	=	$ 5,530.00	
						$14,643.00
Helene Kazanjian	$ 80	x	18.6 hrs.	=		$ 1,488.00
Andrew A. Rainer	$105	x	4.8 hrs.	=		$ 504.00
Allan J. Sullivan	$ 69	x	10.6 hrs.	=	$ 731.40	
	$ 81	x	5.0 hrs.	=	$ 405.00	
						$ 1,136.40
Charles W. Logan	$ 56	x	38.6 hrs.	=		$ 2,161.60
Robert H. Miller	$ 50	x	5.9 hrs.	=		$ 295.00
James Peck-Gray	$ 50	x	16.5 hrs.	=		$ 825.00
					Total Fees	$41,303.00
					Costs	$ 138.55
					Total Award	$41,441.55

For the foregoing reasons, it is ordered that the defendants pay plaintiff $41,441.55 for attorneys' fees and costs.

May 30, 1985
DATE

Richard D. Taylor
DISTRICT JUDGE

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Supreme Court, U.S.
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No. 92-856

In the Supreme Court of the United States

October Term, 1992

JOSEPH J. PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTE at WALPOLE, ET AL.,
Petitioners,

v.

DENNIS J. DOMEGAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Circuit's decision below should be vacated, reversed or remanded in light of this Court's recent decision in Farrar v. Hobby, No. 91-990 (U.S. Dec. 14, 1992), when (i) the First Circuit applied the proper analysis in determining that Respondent was a "prevailing party" under 42 U.S.C. § 1988(b) because he had succeeded on a "significant" constitutional claim in this "bona fide civil rights action," and (ii) the First Circuit applied the proper analysis in determining, on facts that are different from Farrar, that there was no abuse of discretion in the District Court's awarding attorney's fees that had been greatly reduced to reflect Respondent's limited overall success?

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STATUTE INVOLVED

42 U.S.C. § 1988(b). Attorney's fees.

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

This case was originally brought by Respondent Dennis J. Domegan ("Domegan"), a prisoner in the Massachusetts Correctional Institute at Walpole ("MCI-Walpole"), to obtain relief from violations of Eighth and Fourteenth Amendment rights arising out of a prison disciplinary program known as the Alternate Feeding Program ("AFP"). Appendix ("App.") 5a. Under the AFP, Domegan and other inmates were disciplined for certain actions

by being locked behind solid steel doors in their cells. At mealtimes, unless the inmate lay face down on his bed with his cell light on, he received no meal. If he complied with these conditions, he received a meal consisting of nothing but bread and cheese. App. 5a-6a; Domegan v. Fair, 859 F.2d 1059, 1062-63 (1st Cir. 1988). Prison officials determined unilaterally that an inmate should be put on the AFP; the AFP inmate was given no notice or opportunity for a hearing prior to the AFP placement. The inmate's status was reviewed only after five days by the prison official who put the inmate into the AFP program. Domegan was on the AFP for seven and one-half days in May 1983 and for five days in July 1983. App. 5a-6a.

Domegan sued Petitioners -- various administrators and correctional officials -- in 1983. His final amended complaint did not assert that Domegan had been wrongly placed on AFP, but instead alleged that the procedures used in the AFP deprived inmates of liberty without due process of law contrary to the Fourteenth Amendment, that the conditions of Domegan's confinement violated the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment, and that the Petitioners' actions constituted a violation of the Massachusetts Civil Rights Act, M.G.L. c. 12, § 11I. App. 6a-8a. Domegan sought declaratory, injunctive and monetary relief. As compensatory damages for his claims, he sought a total of

$50,000; he also sought punitive damages. App. 7a & 84a n.30. The First Circuit later recognized Domegan's case as a "bona fide civil rights action," notwithstanding the request for damages. App. 80a.

After extensive and difficult discovery (which required Domegan to bring successful motions to compel and which also included an award of sanctions against Petitioners), the District Court summarily ruled for Domegan on liability issues pertaining to the Fourteenth Amendment claim, finding that the AFP deprived inmates of liberty without due process. Petitioners' motion for reconsideration and an interlocutory appeal to the First Circuit -- delaying the trial for approximately one year -- were entirely unsuccessful. See

Domegan v. Fair, 859 F.2d 1059 (1st Cir. 1988).

In March 1989 the case proceeded to trial on the issue of damages for the due process violation, and on the merits of the remaining constitutional claims. By this time, more than five years after bringing this lawsuit, Domegan had been released from prison, and he accordingly "properly refrained" from pursuing further declaratory and injunctive relief. App. 8a & 81a n.28. The jury awarded Domegan damages in the amount of $1 on the due process claim, but held for the defendants on the remaining Eighth Amendment claims. Judgment was entered for $1 against Petitioners. App. 8a-9a.

In subsequent proceedings to determine Domegan's entitlement to a

fee award under 42 U.S.C. § 1988(b), Domegan requested fees and costs in the amount of $88,655.16 for services performed during the five-year time period spanned by the litigation. App. 9a & 96a. In the exercise of billing judgment and because of Domegan's limited success, Domegan's attorneys had reduced the request voluntarily to approximately "one-third of the hours counsel devoted to the litigation." App. 92a & 114a n.41.

Notwithstanding this voluntary reduction, the District Court cut Domegan's fee request by more than half, to $41,441.55, in light of Domegan's limited success. App. 9a-10a, 96a-98a, 131a-132a. See also App. 103a n.36 ("the court reduced the number of compensable

hours from 808.3 to 388.5" to reflect lack of success on other claims). Fees were limited to "only those hours explicitly spent on the due process issue, the summary judgment motion, and the appeal." App. 132a. As a practical matter "essentially no fee award was made for virtually all legal services devoted to pretrial discovery and to the trial itself." App. 112a. Put another way, Domegan had his total fees reduced approximately 80%.

The First Circuit affirmed the District Court's award, with technical modifications that further reduced the fees and costs awarded to $37,123.85. See App. 122a, 124a-125a. Petitioners filed a Petition for Writ of Certiorari.

On December 29, 1992, Petitioners also filed a Supplemental Brief in

this Court, asserting that the decision below should be vacated or reversed and remanded for reconsideration in light of the Court's decision in Farrar v. Hobby, No. 91-990 (U.S. Dec. 14, 1992). This brief responds to arguments raised in both the original Petition and in Petitioners' Supplemental Brief.

SUMMARY OF ARGUMENT

Contrary to Petitioners' assertions, the First Circuit's decision below, reported at 972 F.2d 401, need not be vacated, reversed or remanded because of this Court's decision in Farrar. The First Circuit adopted a legal analysis that is identical to the analysis set forth in Farrar and applied that legal analysis properly to the facts of this case.

As in Farrar, Domegan was found to be a "prevailing party" under 42 U.S.C. § 1988(b) because he prevailed on a "significant" constitutional claim and obtained an enforceable judgment of nominal damages against Petitioners. The First Circuit rightly approved the District Court's decision to award attorney's fees that had been reduced by approximately 80% to reflect Domegan's overall limited success.

In contrast to Farrar, where fees were denied, several factors made a fee award, albeit a very limited one, "reasonable" on the facts of this case. In particular, the First Circuit recognized that Domegan's claim was a "bona fide civil rights action" that was not solely about damages; his victory has precedential

impact and a deterrent effect on further wrongdoing; and the fee award had been properly reduced because of Domegan's limited success.

Under the circumstances, the District Court's exercise of discretion and the First Circuit's conclusion that there was no abuse of discretion are both correct. Nothing in Farrar requires reversal of the lower courts' fact-dependent decisions, and a remand is unnecessary in view of the careful, detailed analysis of the proper factors in the decisions below.

ARGUMENT

I. THE FIRST CIRCUIT CORRECTLY APPLIED THE SAME LEGAL ANALYSIS THAT WAS ADOPTED IN FARRAR.

In Farrar, this Court held that a plaintiff who is awarded nominal damages for violation of

constitutional rights is a "prevailing party" who qualifies for an award of "a reasonable attorney's fee" under 42 U.S.C. § 1988(b). In so holding, the Court adopted the same test for defining a "prevailing party" that was adopted by the First Circuit in the present case. Compare Farrar, slip op. at 8, with Domegan, App. 35a.

The First Circuit correctly held that Domegan was a "prevailing party" because he had "establishe[d] a significant procedural due process deprivation and obtain[ed] an enforceable nominal damage award against the responsible public officials." App. 90a. The First Circuit also held, rightly, that the degree of success -- i.e., the difference between the award requested and the success achieved -- goes to

the amount of the reasonable fee to be awarded, not to whether the plaintiff is a "prevailing party" under § 1988(b). App. 62a & 83a n.29. See Farrar, slip op. at 10; Texas State Teachers Assn. v. Garland Independent School Dist., 489 U.S. 782, 790 (1989) (same).[1/]

On the issue of what is a "reasonable" fee award, both this Court and the First Circuit held that, of the various factors that go into determining "reasonableness," the

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/1/ In this respect, both this Court and the First Circuit rejected the approach taken by the Fifth Circuit in Estate of Farrar v. Cain, 941 F.2d 1311 (5th Cir. 1991). Indeed, this Court's opinion in Farrar notes that the First Circuit's opinion below "rejected the Fifth Circuit's position and held that a nominal damages award does confer prevailing party status." Farrar, slip op. at 4 n.2.

critical factor is the "'degree of the plaintiff's overall success.'" Farrar, slip op. at 10 (quoting Hensley v. Eckerhart, 461 U.S. 424, 436 (1983)); Domegan, App. 103a n.36. And, like this Court, see Farrar, slip op. at 10, the First Circuit recognized that, in a case where a plaintiff has achieved only partial success, a fee award may be excessive if it is calculated by simply multiplying hours expended times a reasonable hourly rate. App. 105a n.37.

The First Circuit noted, however, that in the present case the fee award was not excessive or unreasonable because it had been sharply, and properly, discounted as a result of limited success:

> In response to the limited "degree of success" ... the

district court halved the fee request, even though the request sought compensation for only about one third the total time counsel devoted to the case.

App. 114a n.41 (emphasis added).[2]

See also App. 105a n.37. This

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[2] Petitioners waived their right to challenge this aspect of the fee reduction, for in the First Circuit they "d[id] not contend ... that the district court failed to reduce the fee request to reflect the recovery of only a nominal damage award on the procedural due process claim and the lack of success realized on the other claims." App. 103a n.36. Petitioners conceded below that Domegan's "degree of success" was already fully reflected in the District Court's fee award.

Petitioners now make the additional concession that "[t]hey did not argue [below] that even if Domegan was a prevailing party, the only reasonable fee in the circumstances of this case is no fee at all." Petitioners' Supplemental Brief at 6 n.4. Their failure to make such an argument below also constitutes a waiver of their present assertions.

reduction by the District Court was in addition to counsel's voluntary decision to request only approximately one-third of the total fees actually incurred. App. 114a n.41. As the First Circuit stated, "Careful review reassures us that the district court tailored its total award to reflect the value of the legal services in light of the time reasonably required for their performance and the degree of success achieved." App. 114a.

II. THE DECISION IN FARRAR DID NOT ELIMINATE THE LOWER COURTS' DISCRETION TO APPROVE FEE AWARDS, EVEN IN NOMINAL DAMAGE CASES.

Clearly, this Court in Farrar did not intend its decision to be a mandate that, in all cases where nominal damages are awarded, a fee request must be rejected outright. See Farrar, slip op. at 2 (White, J.,

concurring in part and dissenting in part).

The Court stated that, in cases where limited success is obtained, "the court may lawfully award low fees." Farrar, slip op. at 11. An award of no fees is only appropriate "[i]n some circumstances," and not all plaintiffs who are awarded nominal damages should be denied fees. Id. As Justice O'Connor put it, "Nominal relief does not necessarily a nominal victory make." Farrar, slip op. at 6 (O'Connor, J., concurring). Even if a nominal award in a case seeking compensatory damages "often" means that no fees are appropriate, Farrar, slip op. at 11, it also clearly means that fees are appropriate in other cases in which damages are nominal.

In addition, the Court's decision does not make the nominal nature of the damage award the sole determinant of whether the amount of fees awarded is "reasonable" for purposes of § 1988(b). Other factors, such as the legal issue on which the plaintiff prevailed, Texas Teachers, 489 U.S. at 792, and whether a public purpose is served, Farrar, slip op. at 7 (O'Connor, J., concurring), are also to be taken into account.

The Court's decision in Farrar thus confirms the long-established principle that it is appropriate for the District Court to exercise its discretion, on the facts of the case, to determine the reasonable fee award:

> We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate

> in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.

Hensley, 461 U.S. at 437. This Court has consistently admonished that the district court's balancing of the appropriate factors in determining the amount of the award should be given "appropriate deference." Webb v. County Board of Education, 471 U.S. 234, 244 (1985); Hensley, 461 U.S. at 437. As Justice White stated, "Civil rights cases often are complex, and we therefore have committed the task of calculating attorney's fees to the trial court's discretion for good reason." Farrar, slip op. at 2 (White, J., concurring in part and dissenting in part).

III. THE FACTS OF THE PRESENT CASE ARE DISTINGUISHABLE FROM FARRAR, AND JUSTIFY THE GREATLY REDUCED FEE AWARD THAT WAS GRANTED HERE.

Because Farrar does not establish a per se rule, the only issue presented by this case is the fact-bound question whether the District Court and the First Circuit abused their discretion in allowing the greatly reduced fee award on the facts of this case. For several reasons, the facts of the present case are distinguishable from those in Farrar, and fully justify the limited award of fees granted below.

First, the facts of Farrar are egregious. The plaintiff Farrar -- who died before the trial was held -- brought a suit in which the sole relief sought was $17 million in compensatory damages, based on an

allegation that he had incurred actual injury in that amount. But "because of his failure to prove [actual injury,] an essential element of his claim for monetary relief," his estate recovered nothing from the jury. Farrar, slip op. at 11. The jury only made the generalized finding that defendant had committed an act under color of state law that deprived the plaintiff of a civil right. See Farrar v. Cain, 756 F.2d 1148, 1152 (5th Cir. 1985). The nominal $1 in damages he ultimately received was granted by the Court of Appeals, not the jury. For this he recovered fees of approximately $280,000, more than seven times the fees awarded here. Id.

The issues upon which Farrar prevailed were also insignificant and

of no interest outside the confines of the case. Indeed, the Fifth Circuit explicitly stated in Farrar, "This was no struggle over constitutional principles. It was a damage suit and surely so since plaintiffs sought nothing more." Estate of Farrar v. Cain, 941 F.2d 1311, 1315 (5th Cir. 1991).

Moreover, as this Court expressly recognized, the District Court in Farrar made a fatal error by not taking the degree of success into account at all in determining the reasonableness of the fees. As this Court put it, "the District Court awarded $280,000 in attorney's fees without 'consider[ing] the relationship between the extent of success and the amount of the fee award.'" Farrar, slip op. at 12

(quoting Hensley, 461 U.S. at 438). The District Court failed to "engag[e] in any measured exercise of discretion." Id. at 10.

In the present case, by contrast, the First Circuit held that Domegan "obtained a final judgment for damages on a significant constitutional claim." App. 65a (emphasis added). See also App. 130a (District Court also noting that the claim was "significant"). Domegan proved that disciplinary detention in the AFP without any hearing or timely review of status was facially violative of the Fourteenth Amendment because it imposed punishment without prior notice and an opportunity to be heard. With respect to his success on this claim, the nominal damages award was found by the First Circuit to be

"relief commensurate with the intrinsically- nonpecuniary procedural due process deprivation established" by Domegan. App. 49a.

The First Circuit specifically distinguished the present case from others, like Farrar, in which the sole object of the suit is to recover money damages. App. 76a-82a. Unlike those cases, Domegan's case was a "bona fide civil rights action," which had its genesis in claims for injunctive and declaratory relief, and which "was not converted into a mere tort claim for damages simply because Domegan demanded compensatory relief." App. 80a-81a.

The First Circuit also recognized that Domegan's victory had "substantial" remedial significance and an "intrinsic deterrent effect"

against future constitutional violations by public officials. App. 66a-67a. See also Riverside v. Rivera, 477 U.S. 561, 574 (1986) ("Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards."). Petitioners, who continue to administer prison disciplinary programs, are prohibited from re-adopting the AFP, and will be prevented by the lower courts' findings from adopting programs with similar constitutional defects./3/

/3/ This deterrent and precedential impact of Domegan's successful due process claim is not eliminated by the fact that the AFP was changed by MCI-Walpole after Domegan filed

(Footnote continued.)

And, a case like this one, which has spawned two reported First Circuit decisions, will also serve as a precedent that should deter other prison officials from adopting other disciplinary programs which deprive inmates of liberty without due process.

Finally, in sharp contrast to the District Court in Farrar, the District Court below did "engag[e] in [a]

/3/ (Footnote continued.)

suit. There were two changes in the AFP: the first, in 1983, changed the menu given to AFP inmates; the second, in 1985, adopted post-deprivation review for inmates on the AFP. See App. 8a n.3. Domegan's suit established that Petitioners may not rescind these changes and that any AFP disciplinary program must have adequate due process safeguards. Petitioners -- and other prison officials for whom Domegan's case is an illuminating precedent -- must be aware of and honor the inmates' due process rights.

measured exercise of discretion" and decided to cut Domegan's fee request in half because of "limited success." App. 114 n.41. The District Court decided that counsel should be compensated for "only those hours explicitly spent on the due process issue, the summary judgment motion, and the appeal." App. at 132a. Essentially, no award was given for pretrial discovery and the trial itself. App. 112a. While "[t]here is no precise rule or formula" for tailoring fees to reflect limited success, Hensley, 461 U.S. at 436, this exercise of discretion by the District Court was clearly in compliance with this Court's teaching in Farrar and earlier cases. "The court necessarily has discretion in making th[e] equitable judgment" as to

the amount of a fee award, 461 U.S. at 437, and in this case the discretion was exercised properly.

CONCLUSION

Contrary to Petitioners' assertion, this is not a case in which "the only reasonable attorneys fee is no fee at all." Petitioners' Supplemental Brief at 6-7. Given the differences between the facts of Farrar and the facts of the present case, and given that the First Circuit applied the correct legal analysis when it affirmed the District Court's discretionary determination that a greatly reduced fee award was reasonable under 42 U.S.C. § 1988(b), nothing in Farrar requires this Court to reverse or remand for reconsideration. Indeed, such a step would needlessly extend the life of this

case and cause further expense and delay.

Respondent Domegan accordingly requests that this Court deny the petition for writ of certiorari and let the decision of the First Circuit stand.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONERS

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No. 92-856

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1992

JOSEPH J. PONTE,
SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTE at WALPOLE,
et al.

Petitioners,

v.

DENNIS J. DOMEGAN,

Respondent.

On Petition for a Writ of
Certiorari to the United States
Court of Appeals for the
First Circuit

REPLY BRIEF FOR PETITIONERS

In his Brief in Opposition to Petition for Writ of Certiorari, respondent sets forth factors that he claims distinguish this case from Farrar v. Hobby, No. 91-990, 61 U.S.L.W. 4034

(U.S. Dec. 14, 1992), and warrant a different result here from the one reached in Farrar. While petitioners take issue with some of respondent's characterizations of those factors, they will rely on their Petition and Supplemental Brief as each pertains to the points of disagreement. The sole point of the present Reply Brief is that the factors relied upon by respondent to distinguish this case from Farrar were equally present in Nichols v. Romberg, No. 92-402. Yet on January 19, 1993, this Court granted the petition for a writ of certiorari in Romberg, summarily vacated the judgment of the Ninth Circuit, and remanded the case for further consideration in light

of Farrar.[1] Nichols v. Romberg, 61 U.S.L.W. 3491 (U.S. Jan. 19, 1993).

Romberg involves a civil rights action for violation of the plaintiffs' Fourth Amendment rights as a result of an illegal search and seizure by defendant police officers. Romberg v. Nichols, 953 F.2d 1152 (9th Cir. 1992). As in this case, the District Court awarded attorney's fees based upon the plaintiffs' recovery of a nominal damage award of one dollar. Id. Romberg is indistinguishable from the present case as to the issue of attorney's fees. For

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[1] On the same day, this Court also granted the petitions for a writ of certiorari, vacated the judgments, and remanded for further consideration in light of Farrar, two additional cases, American Council of the Blind of Colorado, Inc. v. Romer, No. 92-217, and Kolodzieczak v. Friend, No. 92-292. 61 U.S.L.W. 3490, 3491 (U.S. Jan. 19, 1993).

example, Domegan claims that his case is distinguishable from Farrar because the jury's finding of a violation of Farrar's civil rights was "insignificant," whereas the First Circuit stated that Domegan had prevailed on a significant constitutional claim. Brief in Opposition at 22. However, the Ninth Circuit similarly described the finding that the Romberg's Fourth Amendment rights were violated as a "significant" constitutional victory. Romberg, 953 F.2d at 1157, 1158, 1159 ("a nominal damages award does not a nominal victory make").

Domegan also notes that the District Court in this case reduced its fee award to reflect the limited degree of his success on the merits of his claims,

while the District Court in Farrar did not take degree of success into account at all in formulating its fee award. Brief in Opposition at 21, 25-26. But the District Court in Romberg similarly reduced its fee award to account for the limited degree of the plaintiffs' success in that case. Romberg, 953 F.2d 1155.[2] Moreover, while respondent

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[2] The District Court in Romberg originally reduced the plaintiffs' fee request from $45,000 to $5,000. Id., 953 F.2d at 1155. The Ninth Circuit vacated the initial fee award because "it was 'unable to review the order' as written[.]" Id. On remand, the District Court set an initial lodestar figure of $48,562.50, which it reduced to $29,137.50 in light of the limited degree of the plaintiffs' success. Id. at 1155, 1161. The Ninth Circuit again vacated the fee award and remanded for reconsideration in light of this Court's decision in Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989). Id. at 1156. The District Court then reinstated its $29,137.50 fee award, and the Ninth Circuit subsequently affirmed. Id.

points out that the fee award in Farrar was more than seven times larger than the fee award in the present case, Brief in Opposition at 20, the $29,137.50 award in Romberg was lower than the $37,123.85 in fees awarded to Domegan. Appendix at 125a.

Petitioners continue to maintain that the judgment of the First Circuit in this case should be reversed in light of this Court's decision in Farrar. Additionally, respondent has failed to point to anything in the facts of this case that justifies different treatment of the petition for a writ of certiorari here, from the petition in Romberg,

which presented an identical issue on indistinguishable facts.

Respectfully submitted,

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No. 92-856

In the Supreme Court of the United States

October Term, 1992

JOSEPH J. PONTE,
SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTE at WALPOLE,
ET AL.,
Petitioners,

v.

DENNIS J. DOMEGAN,
Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
FIRST CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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On Petition for a Writ of Certiorari
to the United States Court of
Appeals for the First Circuit

Supplemental Brief for Petitioners

The Petition for a Writ of Certiorari ("Petition") filed in this case presents the question of whether the First Circuit Court of Appeals erred in awarding attorney's fees pursuant to 42 U.S.C. § 1988 to a plaintiff whose only recovery was a nominal damage award of one dollar. In light of this Court's recent decision in Farrar v. Hobby, No. 91-990 (U.S. December 14, 1992), the answer to that question is plainly yes.

As in the instant case, the plaintiff in Farrar obtained a nominal damage award of one dollar. Id., slip op. at 3. While the Court held that Farrar was a "prevailing party" for purposes of 42 U.S.C. § 1988, Farrar, slip op. at 8, it concluded that he was not entitled to an award of attorney's

fees given his minimal success on the merits of his claims. Id. at 12.

In so ruling, the Court noted that:

> In some circumstances, even a plaintiff who formally "prevails" under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party. . . . When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, . . . the only reasonable fee is usually no fee at all.

Id. at 11 (citation omitted).

The present case is one of the "usual" cases described in Farrar, where only nominal damages are awarded, and the only reasonable attorney's fee is no fee at all. Indeed, Domegan's "victory" in this case was no more significant

than Farrar's. While Farrar received a judgment against just one of six defendants, id., (O'Connor, J., concurring), slip op. at 7, Domegan obtained his one dollar judgment against only three of ten defendants. Appendix ("App.") 8a-9a.[1/] And while Farrar set his sights higher than Domegan (asking for 17 million dollars in damages, Farrar, slip op. at 2), Domegan's one dollar recovery similarly pales by comparison to the $350,000 he sought. App. 7a-8a.[2/]

1/ Three additional defendants were named in earlier complaints but were dropped from the final amended complaint. App. 8a n.3.

2/ The amount sought was composed of $50,000 in requested compensatory damages and $30,000 in requested punitive damages from each of the ten defendants. App. 7a-8a.

Additionally, the present litigation failed to serve any public purpose that might have justified an award of fees independent from the amount of Domegan's recovery. See Farrar, (O'Connor, J., concurring), slip op. at 7. As pointed out in the Petition, Domegan did not represent a class in this case, but represented only himself. Petition at 14-15. More importantly, the Department of Correction's policy that was at issue in this case had been completely changed long before the litigation was resolved (Petition at 15)[3/] and Domegan had been

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3/ Domegan has never claimed that the changes were occasioned by his lawsuit. App. 46a n.15.

released from custody (Petition at 14) by the time his claim for damages went to the jury. Therefore, as tried, Domegan's case, like Farrar's, was nothing more than an attempt to recover damages for alleged past injuries.

In light of this Court's decision in Farrar, while Domegan was a prevailing party for purposes of 42 U.S.C. § 1988,[4/] the only reasonable

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4/ Like both the petitioners and the Fifth Circuit in Farrar (id., (White, J., dissenting), slip op. at 2), the petitioners in this case only argued in their Petition that the "technical" or "de minimus" nature of Domegan's recovery deprived him of prevailing party status. They did not argue that even if Domegan was a prevailing party, the only reasonable fee in the circumstances of this case is no fee at all. Nonetheless, in noting in her concurring opinion that the position of

(footnote continued)

attorney's fee is no fee at all, and therefore, the Court should grant a Writ of Certiorari and summarily reverse the decision of the First Circuit awarding Domegan attorney's fees. Alternatively, the Court should grant a Writ of Certiorari, summarily vacate the First Circuit's judgment, and remand the case for further consideration in light of this Court's decision in Farrar.

(footnote continued)

the petitioners here is supported by the language of this Court's opinion in Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782, 792 (1989), Justice O'Connor stated that "even if the exclusion's location is debatable, its effect is not: When the plaintiff's success is purely technical or de minimus, no fees can be awarded." Farrar, (O'Connor, J., concurring), slip op. at 2. Therefore, the Court should similarly conclude in this case that the appropriate fee award is no fee, and enter judgment accordingly.

Respectfully submitted,

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